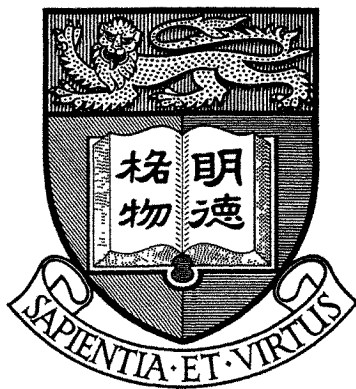


# **HONG KONG'S BILL OF RIGHTS:**

## **1991-1994 AND BEYOND**

*The Problems & Prospects Series*

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**HONG KONG'S BILL OF RIGHTS:**

**1991-1994 AND BEYOND**

*PROCEEDINGS OF A SEMINAR*

*ORGANISED BY THE*

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*EDITORS:*

*GEORGE EDWARDS*

*AND*

*ANDREW BYRNES*

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## PREFACE

On 18 June 1994, the Faculty of Law of the University of Hong Kong held a seminar to review developments under the Hong Kong Bill of Rights Ordinance that had occurred during the first three years after the enactment of the Bill of Rights Ordinance in June, 1991, with an eye towards the impact of the Ordinance post-1994. The speakers at the 1994 seminar came from government, the judiciary, the legislature, the private sector, academia and the broader community.

This volume contains edited versions of the papers presented at the 1994 Seminar. It offers, we hope, a varied picture of further developments under the Bill and of thinking about it in the community.

We particularly like to thank Monnie Lee, Veronica Yiu Mau-ping, Estella Ng, C K Lam, Nancy Choi, Rita Wai Wai-min, Eddie Leung, Raymond Lam, Henley Chan, Alice Iu and other administrative staff members of the Faculty for their assistance. We gratefully acknowledge the financial support of the Hong Kong Research Grants Council for this Faculty's project on the Hong Kong Bill of Rights, of which the publication of these Proceedings forms a part.

**GEORGE EDWARDS**  
**ANDREW BYRNES**

*MAY 1995*

## ***CONTRIBUTORS***

***MR S R BAILEY,***  
Attorney General's Chambers

***MR JUSTICE BOKHARY,***  
Court of Appeal

***MR GARY CHENG KAI-NAM,***  
Secretary General, Democratic Alliance for the Betterment of Hong Kong

***MR DAVID HODSON,***  
Royal Hong Kong Police Force

***PROFESSOR YASH GHAI,***  
Faculty of Law, University of Hong Kong

***MRS RITA LAU,***  
Commissioner for Television and Entertainment Licensing

***MS DAISY LI,***  
Hong Kong Journalists Association

***MS GLADYS LI QC,***  
Deputy Chair, JUSTICE

***MS ANNA WU HUNG-YUK,***  
Legislative Councillor

## **CONVENORS:**

***MR ANDREW BYRNES***  
Faculty of Law, University of Hong Kong

***MR GEORGE EDWARDS***  
Faculty of Law, University of Hong Kong

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**SESSION I:**

***THE BILL OF RIGHTS:***

***IMPACT ON POLICY, AND NEW DEVELOPMENTS***



## FREEDOM OF EXPRESSION AND THE BILL OF RIGHTS -- TOO MUCH TALK, TOO LITTLE PROGRESS

DAISY LI YUET-WAH<sup>1</sup>

The right to freedom of expression, of which press freedom is a vital component, is always regarded as one of the most fundamental of all human rights. Although the right to freedom of expression is stipulated in article 16 of the Bill of Rights, Hong Kong journalists and the public at large do not feel that this very important and fundamental right has been adequately protected under our current legal framework.

On the contrary, numerous draconian laws exist in our statute books which, in our view, clearly violate article 16 of the Bill of Rights, or otherwise pose a threat to press freedom.

Article 19, a London-based international centre against censorship, and the Hong Kong Journalists Association (HKJA) had jointly published a report entitled *Urgent Business: Hong Kong, Freedom of Expression and 1997* in January 1993, examining in great detail the threat repressive colonial laws posed to freedom of expression in Hong Kong.

The HKJA has been campaigning for several years to amend or repeal these draconian laws. We see it as the moral obligation for the colonial government to clean up the statute books before handing Hong Kong over to China, which has a very bad track record of violating the right to freedom of expression.

It is clearly on our agenda that ensuring legal safeguards for this fundamental right is "urgent business", particularly in the light of recent events in the media in the past few months. However, the government seems to operate on a different set of priorities. Much of the work done in the past years was to persuade the government on the urgency of these matters.

Legislative Councillor Ms Emily Lau, my predecessor in the HKJA, had moved a motion in the Legislative Council ("LegCo") on this "urgent business" on 26 February 1992. The motion read as "that this council recognises the vital importance of protecting freedom of the press in Hong Kong and urges the administration to demonstrate its positive commitment to this principle by undertaking to initiate without delay the repeal of all legislation which is in breach of press freedom as protected by article 16 of the Hong Kong Bill of Rights Ordinance 1991."<sup>2</sup>

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<sup>1</sup> Hong Kong Journalists Association

<sup>2</sup> *Hong Kong Hansard* (1992)

Ms Lau further elaborated in her speech by clearly listing out the laws that were in question, including on the top of her list the Emergency Regulations Ordinance<sup>3</sup>, the Broadcasting Authority Ordinance,<sup>4</sup> the Television Ordinance,<sup>5</sup> the Official Secrets Act 1989, etc.

Sir David Ford, the former Chief Secretary replied in his speech by first stating that he had been a strong campaigner for freedom of the press and open government ever since he joined the Government Information Service.

He went on saying that the three officials were voting for the motion. The reason, if I may quote -- "I want to make it very clear that we have no difficulty with this motion. The Administration is committed to defending freedom of the press and freedom of speech in Hong Kong. As I have explained, our judgement is that none of the laws mentioned breach article 16 of the Bill of Rights. And for that reason the three officials will therefore be voting in favour of this motion."<sup>6</sup>

He emphasized several times in his speech that the administration was of the view that the laws identified by Members were not inconsistent with article 16 of the Bill of Rights and, nor did they infringe press freedom. The only "positive" achievement out of this debate was the announcement of the adoption of the Official Secrets Act 1989 (UK) later in that year to replace the 1911 version.

In diluting the argument of members for the localisation of the Official Secrets Act 1989, Sir David replied by saying that "we in the Administration have taken the view that this important advance should not be delayed. It would take far longer clearly to enact local legislation and I can see no good reason to delay action when we have a ready-made provision which is far superior to the present law." Of course Sir David did not explain why the Administration had not introduced this "far superior" 1989 version to replace the 1911 Act much earlier.

This "No-Delaying" tactic was not unfamiliar to Hong Kong people. Only two days ago, Mrs Anson Chan, the present Chief Secretary, has used it again, trying to convince the public why the Administration believed that an administrative code of practice was better than legislative means in giving greater public access to government information.

According to Mrs Chan, the code of practice was "practical and effective

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<sup>3</sup> Cap 241

<sup>4</sup> Cap 391

<sup>5</sup> Cap 52

<sup>6</sup> *Hong Kong Hansard* (1992)

proposals that can be introduced with minimal delay". This "No-Delaying" tactic was described by a *South China Morning Post* editorial as a "Classic Delaying tactic".

Under the Administration of Lord David Wilson, the former Governor and Sir David Ford, the former Chief Secretary, the question of reforming laws which pose threats to press freedom and the enactment of freedom of information legislation was a closed chapter. The present Governor, Mr Chris Patten, seems to take a slightly liberal stand on these matters. However, despite the numerous public statements made by Governor Patten, particularly before overseas audiences, on the importance of press freedom to Hong Kong and his commitment to enhance its protection, there is in fact not much substantial progress in the reform of the laws which may harm freedom of expression and of the press.

Governor Patten agreed with the HKJA in August 1992 to a further review of legislation. We submitted to the government 17 laws which, in our view, were incompatible with article 16 of the Bill of Rights Ordinance, or otherwise pose a threat to press freedom. Among the 17 laws, 11 laws related directly to press freedom, the others related to a broader area of freedom of expression (see appendix attached).

While the Administration did carry out the review, the result was far from satisfactory. In a press release issued in March 1993, the government claimed that freedom of the press was secure under Hong Kong law according to the result of the review. However, the government would propose to amend seven laws or regulations related to the media. In their words, the provisions in these laws and regulation were either obsolete or seemed to be at odds with the Bill of Rights Ordinance.<sup>7</sup>

The attitude of the government towards the reform of those security-related laws, for example, the Official Secrets Act, Emergency Regulations Ordinance and Crimes Ordinance,<sup>8</sup> was basically noncommittal. For the Official Secrets Act 1989, the Administration was of the view that this Act had only recently been placed on the statute books and a review was premature. The Administration was only committed to consider localising the Act before 1997. For other security-related laws, review was still pending.

It has been more than a year since the preliminary results of the review were announced; there has been little progress in the law reform process. Out of the 17

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<sup>7</sup> Cap 383

<sup>8</sup> Cap 200

laws the HKJA submitted to the government, the only laws to have been amended since March 1993 are the three broadcasting laws--the Television Ordinance, the Broadcasting Authority Ordinance and the Telecommunication Ordinance.<sup>9</sup>

Even for these three laws, the Administration did not take the initiative to put forward amendments to repeal those draconian provisions. The passage of the amendments were actually the result of pressure exerted by legislators, the HKJA and other human rights concern groups.

For other laws, there seems to have been continual slippage. These include relatively simple changes to the Registration of Local Newspapers Ordinance<sup>10</sup> and the Prison Rules.<sup>11</sup> The bills relevant to amend provisions of the Summary Offences Ordinance<sup>12</sup> (sections on police power over public meetings and procession) were only introduced into the Legislative Council on 20 April 1994.

Of particular concern to the HKJA are the delays in the review of security-related laws, including the Emergency Regulations Ordinance, the Crimes Ordinance and the Official Secrets Act 1989. The review of these laws was meant to have been completed early this year. However, we are still waiting for the results of this review.

We are deeply concerned that the government may lack the political will to amend all these suspect laws, either because of resistance from within the civil service or because of fear of an adverse Chinese reaction.

Even if the government has the political will, it has to act fast. There are, in reality, only three legislative sessions before the handover in 1997, and possibly only two can be devoted to the debate of all these controversial amendments, leaving the last session for other transitional matters.

There is a clear and urgent need to bring forward meaningful amendments to suspect laws in the very near future, to ensure that the law reform process can be completed well before 1997. It is now time for Governor Patten, as the last Governor of the colonial government, to demonstrate his commitment to the people of Hong Kong.

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<sup>9</sup> Cap 106

<sup>10</sup> Cap 268

<sup>11</sup> of the Prison Ordinance (Cap 234)

<sup>12</sup> Cap 228

**APPENDIX 1**

Following is a list of laws which the Hong Kong Journalists Association thinks, if used by the authorities in full, may threaten press freedom and freedom of expression in Hong Kong.

**LAWS RELATED TO PRESS FREEDOM:**

- 1) Official Secrets Act 1989
- 2) Television Ordinance (Cap 52)
- 3) Telecommunication Ordinance (Cap 106)
- 4) Broadcasting Authority Ordinance (Cap 391)
- 5) Emergency Regulations Ordinance and Emergency (Principal) Regulations (Cap 241) (censorship and suppression of publications)
- 6) Crimes Ordinance (treason/sedition) (Cap 200)
- 7) Police Force Ordinance (Cap 232) (section 50(7) on search and seizure)
- 8) Prevention of Bribery Ordinance (Cap 201) (section 30)
- 9) Registration of Local Newspapers Ordinance (prohibition) (Cap 268)
- 10) Judicial Proceedings (Regulation of Reports) Ordinance (Cap 287)
- 11) Contempt of court (need for a comprehensive Ordinance)

**LAWS RELATED TO FREEDOM OF EXPRESSION:**

- 1) Film Censorship Ordinance (Cap 392) (political censorship)
  - 2) Places of Public Entertainment Ordinance (Cap 172) (prohibitions)
  - 3) Summary Offences Ordinance (Cap 228) (section 4(29) on loudhailers)
  - 4) Public Order Ordinance (Cap 245) (control of meetings and processions)
  - 5) Undesirable Medical Advertisements Ordinance (Cap 231)
  - 6) Defamation Ordinance (Cap 21) (criminal libel)
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## LAW ENFORCEMENT AND THE BILL OF RIGHTS

DAVID M HODSON<sup>1</sup>

Good morning ladies and gentlemen. I am grateful for the invitation to speak at this year's Seminar as I feel it is important that the police join in the public debate on the Bill of Rights.

It does no harm for the "muscles" of the criminal justice system to make occasional contact with the "brains" as represented by this University.

I trust you will bear with me if I interpret my subject in broad terms and also reflect on human rights, as well the effect the Bill of Rights has had on the enforcement of the law. The Bill of Rights after all is only a device to protect human rights. So I thought I would take this opportunity to speak on what we perceive as the issues and problems.

We in the police are very anxious that we are not perceived as opposing the laudable objectives of the Bill of Rights, but we have a different perspective from some legal theorists.

Although I appreciate that it is not a concern of the Bill of Rights, we see a significant threat to human rights coming from criminal activity. Burglary is without a doubt an invasion of privacy; on a personal level, gang rape must be about the ultimate invasion.

If you are in debt to loansharks there will certainly be restrictions on your liberty; many victims are driven to prostitution, drug running, and suicide. If, as a debt-induced drug courier your destination is Singapore, that can mean the gallows.

As a result of our efforts to tackle these criminal activities, we in the police see ourselves very much as being in the business of looking after the interests of the individual and of protecting him from threats to his privacy, life and liberty.

It is accepted that both the state and the police need to be kept in check so that they do not become the oppressor. This is very much the concern of the Bill of

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<sup>1</sup> Assistant Commissioner, Crime, Royal Hong Kong Police

Rights, but there is little point of freeing the individual from one form of oppression only to allow it to be replaced by more sinister oppression from organised crime. This is a very real issue at this time for both Hong Kong and in fact the world.

The enormous threat to human rights posed by organised crime does not seem to be fully understood or appreciated. I will go into this aspect in greater detail later.

Firstly, I will deal with the impact of the Bill of Rights and subsequent judicial decisions on day-to-day law enforcement. The amendment to police powers has resulted from three courses of action:

- a formal review of legislation;
- a judicial decision; and
- self-imposed restraint.

A formal review of legislation to ensure that it is compatible with the Bill of Rights is the most desirable method of law reform from a police point of view. However, this route is slow and in reality is seldom used effectively, unless a serious problem is about to engulf us. Some reviews appear to us to be attempts to impose United Kingdom standards on Hong Kong without identifying the underlying problem that needs resolving. The claimed Bill of Rights concern is often very tenuous. We feel it is for the proponents of change to argue that change is necessary, not for the police to argue that the proposed change is ill-advised.

Several judicial decisions have resulted in the reduction in some of our powers. We do not take issue with these decisions. In fact it has been reassuring to read the Privy Council's judgment that the Bill of Rights should be approached with realism and good sense.<sup>2</sup> Also the view that police powers should be rational and proportional to the issue to be addressed does not cause us any concern.

However, implementing judicial decisions can cause difficulties. First of all one has to work out exactly what is meant and then trawl through the legislation for consequential effects on laws that may vary slightly from that on which the judge

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<sup>2</sup> *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72

has made his decision.

For example, in a recent High Court criminal trial, the judge ruled that the police power to enter and search without a search warrant under the Dangerous Drugs Ordinance<sup>3</sup> contravened the Bill of Rights unless it would have been reasonably impracticable to obtain a search warrant.<sup>4</sup> Again we do not take issue with the decision but there are about fifty Ordinances with similar powers, and there are several Ordinances under which we can be issued with general authorizations to search premises. And finally there is the Gambling Ordinance<sup>5</sup> under which the police are empowered to issue a specific authorization. What effect does the judge's ruling have on these powers?

As I am sure you realise, the presumptions under the Gambling Ordinance, which incidentally have been found to be consistent with the Bill of Rights,<sup>6</sup> apply only if the police have issued an authorization to enter and search the premises. They do not apply if a magistrate has issued a warrant.

As a result of the judge's decision we are trying to ascertain whether we should now assume that these laws have been repealed. It is difficult to enforce the law if you do not know what the law is.

The third category I have mentioned is self-imposed restraint. If it appears to us that our powers are inconsistent with the Bill we impose conditions or a moratorium on the use of the power.

For example we have issued a moratorium on our powers under section 33(6) and section 49 of the Public Order Ordinance<sup>7</sup> in relation to "stop and search" powers and to demand that a person give his name address. Now we rely on our

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<sup>3</sup> Cap 134

<sup>4</sup> *R v Yu Yem-kin* (1994) 4 HKPLR 75

<sup>5</sup> Cap 148

<sup>6</sup> *R v Choi Kai-on* (1994) 4 HKPLR 105

<sup>7</sup> Cap 245

powers under the Immigration Ordinance<sup>8</sup> and the Police Force Ordinance<sup>9</sup> which are not considered to be in conflict with the Bill of Rights. We are required to reasonably suspect an offence before we conduct a full search.

We have also issued self-imposed conditions on our power to seize journalistic material -- we recognise and respect the sensitivity of this material and are anxious to ensure that we act with great restraint.

A side effect of this self-imposed restraint is that if we do not use a controversial power it cannot be challenged in the courts. It therefore remains on the statute books until it is repealed. When this happens is anyone's guess.

A police power that causes concern in some circles is our power to demand proof of identity; in fact it has been described as a serious violation of civil liberties by some at this University.

Frankly, we are not impressed with the arguments that have been put forward -- neither is the Court of Appeal. However, we are impressed with the argument that it is dangerous to pass details of a person's criminal record to a police officer who is checking identity or conducting a search. We agree that this may result in prejudice. The fact that a person has a criminal record should not create the suspicion to justify a police officer carrying out a search. For these reasons we do not pass details of criminal records over the beat radio.

Invariably with every restriction on police powers there is a price to pay. It may be worth paying for the added protection but nevertheless it will have to be paid.

When the law on loitering was amended, the number of arrests for loitering dropped from about 420 per year to about 150. One of the costs -- lost wallets, the most accurate indicator of pickpocketing, rose by about 9% per year at a time when crime generally was dropping. I appreciate the connection is very simplistic but the point is, there was a cost. In this example it may have been a cost that was worth

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<sup>8</sup> Cap 115

<sup>9</sup> Cap 232

paying. But remember police are now less able to take action against people who loiter outside schools and in the corridors of housing estates.

In some areas, however, we ought to consider carefully whether we can afford the cost if we get it wrong. To decide what powers would be rational and proportional to deal with a particular problem we need to study the problem. Let us look at organised crime.

Some of the measures we have taken are frankly not very effective. It may surprise you to learn that in the past four years, 97% of the money actually recovered in Hong Kong from the proceeds of drug trafficking resulted from judicial decisions in the United States. Less than \$4 million has been recovered as a result of judicial decisions in Hong Kong. No-one has ever been convicted of money laundering in a city widely recognised as being a major centre for the activity -- hardly an impressive record. Amendments to make the law effective are currently being worried through the Administration -- there are concerns about Bill of Rights implications.

The police first rang the alarm bells about organised crime eleven years ago. What is the situation now? In Hong Kong organised crime is considered to dominate some sectors of the film industry, and problems ranging from smuggling to extortion in the construction industry feature regularly in our media.

But I would like to focus on another aspect of international organised crime to illustrate the potential threat that exists. The Director of the Federal Bureau of Investigation, Louis Freeh, is gravely concerned that Russian organised crime may already have the capability to steal nuclear weapons and that such weapons may be sold to terrorists.

You may ask what the relevance is of Russian organised crime to Hong Kong. Let me attempt to answer. Russian organised crime is so powerful that President Yeltsin said in February this year that it is the number one problem facing his country.

There are already links with Chinese organised crime and they are deeply involved in international money laundering. The Americans, our principal trading

partners, consider heroin gangs operating out of Hong Kong and other cities in Asia to be "one of the most significant threats to US national security".

Mr Freeh said in his testimony before a Congressional hearing in May this year that it is essential to take action before a major nuclear incident occurs. He said criminals who freely smuggle drugs would certainly be capable of smuggling nuclear materials. The German federal police, the Bundeskriminalamt, have reported an increasing number of incidents involving nuclear and related materials, 241 incidents in 1993.

He went on to say that the United States slept for decades and by default permitted organised crime to grow. He stressed the time to move against such threats as nuclear weapons in the hands of criminals is now -- not after there has been an incident of mass destruction.

So what are we doing in Hong Kong? Where is our law that is rational and proportional to the problem at hand?

We must keep our concerns about abuses of human rights and the abuse of power by the police in proportion so that we are able to tackle the real threats that exist in the real world.

We must not allow rational proposals to become clogged in the arteries of government by bureaucratic cholesterol and indecision.

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# BROADCASTING AND THE BILL OF RIGHTS

RITA LAU<sup>1</sup>

Ladies and Gentlemen,

It is a pleasure to be here this morning to talk about how the Bill of Rights affects our regulation of broadcasting. What I would like to do is to explain briefly how we regulate broadcasting in Hong Kong, and follow that by a few examples of how the Bill of Rights has affected that regulation, and then give a few thoughts on some current "hot topics" as they impact upon the freedom of expression.

The Bill of Rights is, of course, of particular relevance to our broadcasters as article 16 provides that everyone may hold an opinion and has the right to express it.<sup>2</sup> To that extent virtually *any* form of broadcasting regulation will serve to fetter the rights granted under the Bill of Rights and it is up to the government, therefore,

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<sup>1</sup> Commissioner for Television and Entertainment Licensing Hong Kong (TELA)

<sup>2</sup> Article 16 of the Hong Kong Bill of rights provides:

"Freedom of Opinion and Expression

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary --
  - (a) for respect of the rights or reputations of others; or
  - (b) for the protection of national security or of public order (*ordre public*), or of public health or morals."



to justify its restrictions as necessary and acceptable under article 16.

Perhaps I can first explain how the broadcasters in Hong Kong are regulated and, in the process, clear up a few common misunderstandings. Commercial broadcasting in Hong Kong (that is to say excluding Radio Television Hong Kong ("RTHK") and British Forces Broadcasting Service ("BFBS")) is controlled by the Broadcasting Authority, which is required under the law to regulate the licensed commercial broadcasters. Regulation involves ensuring that the licensees abide by the terms and conditions of their licences (which are issued not by the Broadcasting Authority but by the Governor-in-Council), responding to complaints and issuing codes of practice governing the contents and technical standards of broadcasts.

The Broadcasting Authority is an independent regulatory body established by statute, and is assisted by the Television and Entertainment Licensing Authority which acts as its executive arm -- that is to say we work for the Broadcasting Authority, providing the manpower and the facilities for the Broadcasting Authority to carry out its duties effectively, and any powers that we have in this are derived from the Broadcasting Authority. Under the authority of the Broadcasting Authority, therefore, TELA monitors various broadcasts, processes complaints, researches and drafts codes of practice and gathers information of use to the Broadcasting Authority. At the end of the day though, it is the Broadcasting Authority itself that will take the decisions affecting the broadcasters and their viewers or listeners.

One thing I should stress at this point is that, contrary to the impression sometimes given in the media, neither the Broadcasting Authority nor TELA *censors* broadcasts. The current statutory powers given to the Broadcasting Authority do not include the power to preview or prohibit programmes of any kind. Instead, as I mentioned earlier, the Broadcasting Authority issues codes of practice setting various standards and minima for the broadcasters to follow. If the broadcasters breach these standards, and I do not believe they are particularly onerous, the Broadcasting Authority has the power to impose sanctions on the licensees such as warnings or financial penalties. But this is always after the event.

So what do these codes of practice regulate? As I mentioned before it is the *standards* that are regulated rather than the contents per se. The Broadcasting Authority does not, for example, in general dictate what shall be shown. I say "in general" because some licensees have certain public broadcasting obligations imposed as part of their licence conditions and these require, for example, the broadcast by the licensee of a minimum amount of news programmes or children's programmes. However, even where a licence does require a certain amount of a particular programme type to be broadcast -- and these requirements also are not onerous by the way -- the Broadcasting Authority does not specify in detail what should or should not be shown. This is the reason, incidentally, why the Broadcasting Authority has not required TVB to broadcast an acquired documentary on Chairman Mao -- the Broadcasting Authority does not specify what commercially-acquired programmes a licensee should broadcast. To do so would be an unwarranted interference in the editorial freedom that is the right of all our commercial broadcasters.

So the Broadcasting Authority sets standards, on such matters as violence, bad language, and material unsuitable for children. These standards, set out in its codes of practice, are intended to reflect the general level of social acceptability of the various matters, and the Broadcasting Authority goes to great lengths to keep abreast of the latest accepted standards. It regularly commissions surveys into public attitudes to broadcasts; the latest such survey has only just been completed and will provide useful feedback for the Broadcasting Authority when it looks at its codes again in the future. In addition, there is established a public advisory system for the television services under which more than 600 people from all over Hong Kong give the Broadcasting Authority their views on what is broadcast by the various television licensees. So the Broadcasting Authority is fairly well attuned to the latest levels of acceptability by the public and it regularly fine-tunes its codes of practice to accommodate changes in public opinion, as well as in response to ideas and suggestions from the broadcasters themselves.

Now, all of this begs the question of why the Broadcasting Authority or

anybody else should regulate what is shown on TV or broadcast by radio, particularly in the light of article 16. Proponents of less regulation will argue that people should be able to see and listen to what they want in the privacy of their own home, and that the responsibility of protecting children from unsuitable material should be left to the parents.

Well, in the first place all the feedback received to date indicates public support for regulating the contents of programmes and advertisements shown on the electronic media. TV and radio are influential and pervasive media and hard to avoid, especially in a territory like Hong Kong where watching television is the number one leisure activity, and where every home and many small shops have televisions and radios, usually switched on.

Our conclusion that such a powerful medium as broadcasting needs some regulation is, of course, not unique. Every country in the world does so to a greater or lesser degree and, by comparison, our regulatory system here is quite light; we do not, for example, impose onerous local content requirements on our broadcasters, as happens in several overseas countries, limiting such requirements to a minority of children's and documentary programmes.

Some overseas countries are now moving further in the direction of regulation, particularly in the matter of violent programmes and movies believing that earlier, more liberal, regulation has been a mistake. Whilst I believe that evidence of any causal link between media violence and violence in society is not conclusive, there is public concern about violent television programmes and this cannot be ignored completely.

The Bill of Rights gives us the legal basis for such regulation. Article 16 provides for restrictions on freedom of expression where such are necessary for the respect of the rights or reputations of others or for the protection of public order, health or morals. Most of our regulation can be justified under the latter consideration, public morals, though the protection of public health does play a part, particularly in our restrictions on certain types of advertising, and it is not fanciful to suggest that the protection of public order can be a consideration for

regulating an industry where at any one time up to a third of the entire population may be glued to one particular television programme.

This is not to say that because we *can* restrict the freedom of expression of our broadcasters we do so with gleeful abandon. The Broadcasting Authority is very much aware of the need to keep its restrictions to the *absolute minimum* necessary to maintain an effective regulatory system. Over the years the move has been towards deregulation. And the Bill of Rights, whilst helping us in this direction, by no means began us on our journey. Thus we no longer preview any TV or radio programmes or advertisements, but rely entirely on regulation after the event where necessary. Last year, to conform to the Bill of Rights, we removed the power of the Broadcasting Authority to prohibit the broadcast of TV programmes and left this in the hands of the courts. Last year, again, the Broadcasting Authority moved to remove the ban on the advertising of certain products, such as overseas properties. You may think that this is of little consequence and, indeed, it may be, but it is an example of the attention of the Broadcasting Authority to minor matters that, taken as a whole, is leading us to a more deregulated environment. It is also evidence of the Broadcasting Authority's willingness to deregulate, as in this latter example there was quite a lot of opposition from some concerned parties who feared that the viewers may be misled by unscrupulous advertisers.

As I mentioned before, the Broadcasting Authority issues codes of practice to regulate the contents of broadcasts. One major impact the Bill of Rights has had on our operations is that prior to issuing any new codes, or amending existing ones, the Authority now scrutinises them very carefully, with the aid of legal advice, to ensure compliance with the Bill of Rights.

But whilst the Broadcasting Authority is very much aware of its need to respect the freedom of expression and the editorial independence of our broadcasters, the same cannot, I'm afraid, be said of many members of the public if recent events are anything to go by. A few things have happened lately that have brought the editorial independence of the broadcasters into the public eye, and these are Chairman Mao, Judge Pao and an obscure Spanish documentary on June 4th.

For those of you who do not watch TV or read the papers I will, very briefly, explain the background to these events.

Firstly, Chairman Mao. TVB reportedly bought the rights to the BBC documentary "Chairman Mao -- The Last Emperor" which paints an unflattering picture of the late Chinese leader. TVB has, to date, not broadcast the documentary and some people have accused it of "kowtowing" to China.

Then we had the "Judge Pao" débâcle. This popular Taiwanese drama was being broadcast by TVB when ATV bought the rights to the same series and started showing it too. At one stage both Chinese channels were showing the same story at the exact same time, and were rightly criticised by the public for reducing viewer choice.

Finally the obscure Spanish documentary. Six members of ATV's newsroom resigned after alleging that ATV management attempted to suppress the broadcast of some footage about the June 4th massacre. ATV management denied it all, and the public, siding with the journalists, criticised ATV for attempting to undermine the autonomy of its news department.

I do not propose to get into a debate on who is right and who is wrong with regard to these three incidents. The press have had a field day and all views, including those of the government, have been widely reported. I cite them because amongst all the hullabaloo a constant has emerged -- that of a desire to see the government "do something" about it. All three incidents illustrate decisions that are unpopular in different ways, made by licensees as is their right under the freedom of expression considerations of the Bill of Rights, and which many members of the public believe should be overturned by government.

How are we supposed to react to this? It is easy to say yes, we will make TVB show the Mao documentary, we will make ATV management give autonomy to its news department, and we will ensure that both stations do not show Pao at the same time. That would make us popular. But the problem is to do so we would have to sacrifice the broadcasters' editorial independence and interfere in their management structure. Our existing regulatory framework does not allow us to do

this, so we would have to make changes. It would be no use introducing licence conditions that were more exhortations to the licensees to be, in some vague way, more responsible; we would have to impose conditions that gave the Broadcasting Authority some teeth. In doing so I fear we would end up going further than the Bill of Rights allows: because whilst we can restrict the freedom of expression (and by extension I presume the freedom not to express) for the protection of *public order, health or morals*, the Bill of Rights doesn't say much about *public outrage*. Perhaps Mao, Pao and an obscure Spanish documentary is the price of freedom.

Ladies and gentlemen, as you have probably gathered, I am not a lawyer, or an expert in the Bill of Rights. This is both a curse and a blessing. A curse because I wish sometimes I had more expertise in the Bill of Rights to help me in some of the thornier issues that we face; a blessing because any mistakes I make in this respect can, perhaps, be excused. I have tried to give some background to the effect of Bill of Rights considerations on broadcasting in Hong Kong as I see it, and I hope that it made some sense to you. If you have any questions I shall be happy to attempt an answer.

Thank you.

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**SESSION II:**

***THE BILL OF RIGHTS IN THE COURTS***





# THE BILL OF RIGHTS IN THE COURTS: A JUDICIAL VIEW

## THE HONOURABLE MR JUSTICE BOKHARY JA<sup>1</sup>

We lawyers love to talk shop. And seminars are occasions for talking shop on a grand scale. There is nothing wrong in that: provided that it is not done on a closed-circuit, with us talking only to ourselves and leaving out everyone else. That proviso is particularly important where the Bill of Rights is concerned. In that area, the legal community simply cannot afford to leave the rest of the community behind.

### **Human rights in action**

I am here to offer a judicial view on the Bill of Rights in the courts: in other words, human rights in action.

### **The non-lawyer's question**

Before we take a single step further, I would make a suggestion. Nobody will resent my saying this. Some non-lawyers know as much about the Bill of Rights as most lawyers. But on the whole, it is only natural for them to look to us. So let us consider what answer should be given to a non-lawyer who, with genuine interest, asks us: "what is the Bill of Rights, really?"

### **The answer**

An acceptable answer -- I lay no claim to perfection for it -- is, I suggest, one along these lines:

It is a written guarantee of human rights given by the government to everyone in Hong Kong. The government cannot go back on that guarantee. And the courts will enforce it.

The document containing it is in English and Chinese. It is not long: only

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<sup>1</sup> Justice of Appeal, Court of Appeal, Hong Kong

17 pages for both languages together. You may care to read it sometime. I will let you have a copy, if you like. And, if you are that interested, we can have a chat after you have had a look at it.

Meanwhile, I can give you an idea of the rights which are covered.

Those rights are there for everyone without distinction.

### **Continuing**

Now, let us pause here to consider how best to continue that answer. If that were done by listing all the rights contained in the Bill, the answer might continue along these lines:

*Some things are banned:* torturing people; subjecting them to inhuman treatment; conducting experiments on them without their consent; reducing them to slavery or servitude; imprisoning them just because they cannot fulfil their contracts; arbitrarily expelling them from Hong Kong when they are lawfully here although without the right of abode; punishing them under a law brought in after what they are being punished for. All those things are banned.

*Other things are secured:* the right to life; liberty and security of person; rights retained when lawfully detained; liberty of movement within Hong Kong and to leave Hong Kong; equality before the courts and the right to a fair and public hearing; the rights of accused and convicted persons including the presumption of innocence, trial without undue delay and the right against self-incrimination; the right to recognition as a person before the law; freedom from arbitrary or unlawful interference with privacy, home, family or correspondence and from unlawful attacks on honour and reputation; freedom of thought, conscience and religion; freedom of opinion and expression; the right of peaceful assembly; freedom of association; the right freely to enter into marriage and to found a family; the special rights of children; the right to participate in public life; equality before the law and equal protection of the law; the special rights of minorities. All those rights are secured.

### **Something simpler**

But unless you have an extraordinary memory and your listener has an equally extraordinary capacity for absorbing information, that would over-burden the answer which is, after all, an oral one. It is necessary, therefore, to offer something simpler. And that can be done by providing samples, like this:

*Some things are banned, for example:* torture; slavery; and imprisoning people just because they cannot fulfil their contracts.

*Other things are secured, for example:* liberty of movement; the presumption of innocence; trial without undue delay; freedom of expression; the right of peaceful assembly; and equality before the law.

### **Finally**

Finally, the answer may usefully conclude thus:

One word of warning. Do not rely on the Bill of Rights alone. For example, it does not ban the death penalty. But Hong Kong has nevertheless abolished the death penalty for murder. And the Bill does not mention trial by jury. But attempts to curtail trial by jury have been fought off nevertheless.

### **Assessing the benefit for themselves**

The law has its own idiom. Within reason, I think that other people are prepared to tolerate that. But they are entitled to expect that what we lawyers say will be intelligible to them.

Non-lawyers would, I think, generally accept the legitimacy of jurisprudence and its different schools of thought and shades of opinion. But let us not deceive ourselves or run the risk of ultimately losing their support. I think that we would be doing both if we were to imagine that they are more interested in hearing us philosophize than in assessing for themselves the real benefit of what the courts do when applying the Bill of Rights in actual cases.

**Simple and succinct**

In giving its landmark 1954 decision that racial segregation in schools is unconstitutional,<sup>2</sup> the United States Supreme Court did so in a judgment so simply and succinctly expressed that everybody could see precisely what the court had done and why.

The court held that state laws excluding the children of a racial minority from schools attended by other children denied the excluded children the equal protection of law guaranteed by the Fourteenth Amendment of the United States Constitution. Accordingly, racial segregation in schools was unconstitutional. It was no answer, the court said, that separate schools provided for the minority were equal to other schools in terms of tangible factors such as buildings, curricula and the qualifications and salaries of teachers. For what such segregation inevitably said to the minority children was that they were considered inferior.

**Nothing ambiguous**

Immediately afterwards and on the very same day, the court gave its decision that racial segregation in schools was also unconstitutional in the District of Columbia even though the Fourteenth Amendment only applied to the states and not to that federal district.<sup>3</sup> The court based its decision on the due process clause in the Fifth Amendment which did apply to the District of Columbia. The reasoning by reference to due process is perhaps less obvious than that by reference to equal protection. But there is nothing ambiguous in the court's statement:

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on

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<sup>2</sup> *Brown v Board of Education*, 347 US 483 (1954)

<sup>3</sup> *Bolling v Sharpe*, 347 US 497, 99 L Ed 2d 884 (1954)

the Federal Government."<sup>4</sup>

### **Ancient and eternal**

The rights contained in the Bill of Rights are not new or transient concepts. Rather, they are ancient and eternal precepts. What is new is that they now have a legal status worthy of their moral status.

### **Public support**

The matter resting as it does on such sure foundations, why -- it might be asked -- concern ourselves with securing public support?

### **Two reasons**

I offer two reasons.

First, everybody is entitled to be involved.

Secondly, moods can change. And, as we have witnessed in the past, let there be a crime wave or a spate of failed prosecutions and some people begin to question the value even of things such as the right of silence and trial by jury.

### **Letting them know**

So I trust that you will share my wish that people from all walks of life and backgrounds know what the courts are doing under the Bill of Rights. They are entitled to know. And letting them know is the only sure way to win their enduring support for human rights as an inalienable part of our law.

We are here concerned with an area of the law where ideals are at their highest. But that hardly means idealism at the expense of reality.

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<sup>4</sup> *Bolling v Sharpe*, 347 US 497 at 500, 99 L Ed 2d at 887

**Balanced**

The approach of the courts is a balanced one: although one which is -- as it should be -- strongly disposed towards individual freedom.

**Examples: from the presumption of innocence**

In the limited time available, it is necessary to illustrate that by taking no more than a few examples. The presumption of innocence is as well-known a human right as any. So I will take my examples from cases concerning it.

**Dangerous drugs**

It had long been part of our statute law that possession of a certain quantity of dangerous drugs gave rise to a rebuttable presumption that such possession was for the purpose of trafficking. Then there came a time when active consideration was being given to revising upwards the quantity of drugs necessary to trigger that presumption. While that was going on, the Court of Appeal, in a case decided one year before the Bill of Rights became law, underlined the importance of due regard to the quantity of drugs which an addict might well have in his possession for his own consumption.<sup>5</sup>

**Presumption of trafficking Bill repealed**

It is hardly surprising, therefore, that, as soon as the Court of Appeal had occasion to consider whether that presumption had been repealed by reason of its inconsistency with the Bill of Rights -- article 11(1) of which provides that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" -- the court held that it had indeed been thus repealed.<sup>6</sup>

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<sup>5</sup> *R v Lau Tak-ming and others* [1990] 2 HKLR 370

<sup>6</sup> *R v Sin Yau-ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127

### **Entire offence Bill repealed**

There a presumption was held to have been repealed for Bill inconsistency. That left the prosecution free to prove its case where it had the evidence to do so. In another case,<sup>7</sup> the Privy Council, affirming the view of the Hong Kong courts, held that an entire statutory offence, unlawful possession, had been repealed by reason of Bill inconsistency. That was because the effect of the section creating the offence<sup>8</sup> was that no more than reasonable suspicion of dishonesty placed the onus of disproving the same on the accused. That being the substance of the matter, it made no difference that, as a matter of form, such effect was built into the definition of the offence.

### **The other case**

That was one of two cases dealt with together by the Privy Council on that occasion. The other case<sup>9</sup> concerned the offence of assisting another to retain the proceeds of drug trafficking.<sup>10</sup>

To that statutory offence, certain special defences were provided.<sup>11</sup> The burden of proving them (on a balance of probabilities) was placed on the defendant.<sup>12</sup>

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<sup>7</sup> *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72, [1993] AC 751

<sup>8</sup> Section 30 of the Summary Offences Ordinance (Cap 228)

<sup>9</sup> *Attorney General v Lo Chak-man and another* (1993) 3 HKPLR 72, [1993] AC 751

<sup>10</sup> Contrary to section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)

<sup>11</sup> These special defences were provided in section 25(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

<sup>12</sup> See section 25(4) of the Drug Trafficking (Recovery of Proceeds) Ordinance.



But before the defendant could have any need to rely on any of those defences, the prosecution had to prove (beyond reasonable doubt) the substance of the offence, namely, that the defendant had been involved in an arrangement relating to another person's proceeds of drug trafficking knowing or believing that that person was connected with drug trafficking.

The Privy Council held that in such circumstances article 11(1) was not infringed.

### **The test**

Whenever there is a departure from the normal principle that it is for the prosecution to prove its case beyond reasonable doubt, the question is whether that particular departure is justifiable. And it was in those two cases, dealt with together, that the Privy Council laid down the test for answering that question.

That test is:

Whether it remains primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines.<sup>13</sup>

The balance achieved under that test is illustrated by the results of the two cases decided on the occasion on which it was laid down.

### **Not only in trifling cases**

In relation to one of those cases, the Privy Council referred to "the context of the war against drug trafficking".<sup>14</sup> But that does not mean that it is only in trifling cases that reverse onus provisions are held to be Bill inconsistent. In the unlawful

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<sup>13</sup> *Attorney General v Lee Kwong-kut; Attorney General v Lo Chak-man and another* (1993) 3 HKPLR 72, [1993] AC 751

<sup>14</sup> *Attorney General v Lo Chak-man* (1993) 3 HKPLR 72 at 98

possession case, the amount involved was no less than \$1.7 million.<sup>15</sup>

### **Unconstitutional?**

In a very recent case<sup>16</sup> the Court of Appeal had to consider a presumption enacted after the Bill of Rights became law. So the question was not whether the presumption had been repealed.<sup>17</sup> Rather, it was whether it was unconstitutional.<sup>18</sup>

As to that, we said:

"The Letters Patent trench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the Covenant as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution. And the test of constitutionality is the same as the test of Bill consistency."

The presumption<sup>19</sup> was couched in these terms:

"If in any proceedings under this Part a person is alleged to be, and there are reasonable grounds for believing that such a person may be an unauthorized entrant, that person shall be presumed to be such in the absence of evidence to the contrary."

### **Construction**

Construing the presumption restrictively -- as the appellants submitted and the prosecution conceded it ought to be construed -- the court held that a person is only to be presumed to be an unauthorized entrant if it appears more likely than not that

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<sup>15</sup> *Attorney General v Lee Kwong-kut* (1993) 3 HKPLR 72 at 83-84

<sup>16</sup> *R v Chan Chak-fan; R v Lai Yiu-pui* (1994) 3 HKPLR 115

<sup>17</sup> By operation of section 3(2) of the Hong Kong Bill of Rights Ordinance

<sup>18</sup> By virtue of the Hong Kong Letters Patent (No 2) 1991

<sup>19</sup> Section 37K(1) of the Immigration Ordinance (Cap 115)

he is one. And the court held that, thus construed, the presumption was not unconstitutional.

Referring to the test laid down by the Privy Council, we said:<sup>20</sup>

"In our judgment, s 37K(1) passes that test. In the paragraph in which the test is laid down, the Privy Council went on to cite the decision of the United States Supreme Court in *Leary v United States* 395 US 6, 23 L Ed 2d 57 (1969). And the Board adopted that court's statement (US at 36, L Ed 2d at 82) that it will be difficult to justify a presumption unless 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.'

Now, as we construe s 37K(1), a person is only presumed to be an unauthorized entrant if it appears more likely than not that he is one. And the prosecution's responsibility includes making that appear. Construed restrictively as we construe it, the departure here from the normal principle is within acceptable bounds as a measured response to the serious, prevalent and difficult problem presented by the activities of those who make money by smuggling human cargo into Hong Kong. The presumption contained in the s 37K(1) is justifiable. And the argument that the subsection is unconstitutional fails."

### **Beyond the conviction stage**

Finally on presumptions, I would like to mention the application of the presumption of innocence beyond the conviction stage.

### **Two cases**

Here, two decisions of the Court of Appeal indicate the boundaries.

### **First**

In the first,<sup>21</sup> we were concerned with a man who had been convicted of managing

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<sup>20</sup> *R v Chan Chak-fan; R v Lai Yiu-pui* (1994) 4 HKPLR 115 at 124-125

<sup>21</sup> *R v Wong Yan-fuk* (1993) 3 HKPLR 341

an unlicensed massage establishment. The section under which he was convicted<sup>22</sup> provided that first offenders were liable to a fine of \$50,000 and imprisonment for 6 months, while repeat offenders were liable to a fine of \$100,000 and imprisonment for two years. This man was a first offender. But the section provided that if within three years of a defendant's conviction another person had been convicted under the same section in respect of the same place, then, even though the defendant was himself a first offender, he would nevertheless be liable to repeat offender punishment unless . . . Unless what? I will tell you: unless he satisfies the court that at the time when he committed his offence he did not know that another person had been so convicted before and . . . And what? I will tell you: and he did not even have any reason to suspect that another person had been so convicted before.

This was strong stuff. And we would not have it.

### **Purposive**

Even though it concerned the post-conviction stage, we held that article 11(1) reached it. The prosecution's argument was that the expression "proved guilty" in the article meant *convicted of the offence charged*. We rejected that argument, saying:

"We are here concerned with crime and punishment. A purposive approach is called for. 'Proved guilty' must mean *proved guilty of the acts or omissions punishable*."<sup>23</sup>

Once we held that the Bill of Rights extended to that reverse onus provision, we had no hesitation in holding that the provision was inconsistent with the Bill and had been repealed by it.

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<sup>22</sup> Section 4 of the Massage Establishment Ordinance (Cap 266)

<sup>23</sup> *R v Wong Yan-fuk* (1993) 3 HKPLR 341 at 350

**Second**

In the second of the two decisions<sup>24</sup> we were concerned with a man who had been convicted of manufacturing dangerous drugs and of possession of dangerous drugs for the purpose of unlawful trafficking. He had already been sentenced. A huge quantity of drugs were involved. And he had drawn 17 years' imprisonment. Then the judge turned to the question of a confiscation order. And, after hearing evidence and argument, he made one in the sum of \$8,414,818, fixing three years as the prison term which the defendant was to serve if any of that amount was not duly paid or recovered.

It all turned on, of course, whether the defendant had benefited from drug trafficking and, if he had, by how much.

**Without recourse**

The judge found, without recourse to any reverse onus provision, that over a period of 14 months the defendant (a man whose honest means and earnings were modest) had received a total of \$8,414,818.

It was against the background of the defendant's convictions and of that finding that the judge turned to the reverse onus provisions in question, which took the form of assumptions which the court was permitted -- but not obliged -- to make.<sup>25</sup>

**Enforcing the order**

We noted that these assumptions, unlike the provision in the massage establishments case, did not render a person convicted of one thing liable to be punished as if he had been convicted of something more than that. And we

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<sup>24</sup> *R v Ko Chi-yuen* (1994) 4 HKPLR 152

<sup>25</sup> Section 4(2) and (3) of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)

continued by saying that.<sup>26</sup>

"What we have here are assumptions designed to make convicted and sentenced drug traffickers disgorge their ill-gotten gains. When a prison term in default is fixed, that is not to punish him for benefiting from drug trafficking. It is to enforce the court's order for payment.

A person against whom a confiscation order is sought is not charged with benefiting from drug trafficking. There is no such offence known to the law.

Article 11(1) does not extend to confiscation proceedings such as these."

### **Justifiable anyway**

For completeness, I should tell you that we went on to say that if the article had extended to such proceedings, the assumptions would be justifiable exceptions to the normal principle that it is for the prosecution to prove the defendant's guilt beyond reasonable doubt. The assumptions being ones which the courts were permitted -- but not obliged -- to make, the courts would of course only make them when it was rational and realistic to make them in the context of the facts duly established. And giving the courts power to make assumptions such as these when it is rational and realistic to make them is, we held, proportionate to the grave danger to society of leaving drug traffickers rich and to that extent powerful even when behind bars.

### **Team**

Having surveyed a number of our decisions, I should add that judges are always grateful for the assistance which they receive from practitioners. And practitioners are, I expect, often assisted by the writings of academics. I see myself as a member of a very large team. I am proud of every member of it.

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<sup>26</sup> *R v Ko Chi-yuen* (1994) 4 HKPLR 152 at 158

**Ideals into reality**

When it comes to detail, you cannot expect everybody to agree on everything all the time. The Bill of Rights is no exception. But that does not matter. What matters is this. The Bill of Rights takes ideals and turns them into reality. That is human rights. There is only one kind of efficiency which the Bill of Rights properly applied could possibly impede. That is *ruthless* efficiency -- which is a kind we can do without.

**Conclusion**

Now, I do not expect the public to take all of that on my, or anybody else's, say so. In fact, I do not even want them to. Rather, I would like them to see for themselves what the courts do in actual cases. That they do so is my hope. That they are able to do so is their right. It is in furtherance of that hope of mine and, far more importantly, in fulfilment of that right of theirs that I make my call for plain speaking. And that is the judicial view which I have endeavoured to illustrate.

Thank you.

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## CRIMINAL LAW AND PROCEDURE

S R BAILEY<sup>1</sup>

I was pleased to be invited again to speak at the Faculty of Law's Bill of Rights Seminar. I was even more pleased when Andrew Byrnes suggested that instead of specifically addressing article 11(1) of the Bill of Rights's -- the presumption of innocence -- as I have done on the two previous Seminars, that I might consider a more general review of the Bill of Rights's impact upon criminal law and procedure. Frankly, the attractions of discussing *R v Sin Yau-ming*<sup>2</sup> and *Attorney General v Lee Kwong-ku*<sup>3</sup> wear thin after the first fifty or sixty occasions. Those of you who are unfamiliar with those legendary names should count yourselves fortunate.

This morning I would like to take issue with the programme notes for today's Seminar and in particular this passage:

"While the Bill had a high profile impact in its early years, some consider that it is now largely a spent force, with the courts reluctant to uphold significant challenges and the executive taking a minimalist approach to its implementation."

The notes give no clue as to the identity of those who hold the opinion that the Bill of Rights is "largely a spent force". Whoever they are, I would be surprised to learn that any are included in the ranks of the Prosecutions Division of the Attorney General's Chambers or the law enforcement agencies.

It is, I suggest, quite wrong to gauge the success or otherwise of the Bill of Rights by the number of successful "challenges" in courts -- particularly those with

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<sup>1</sup> Senior Assistant Crown Prosecutor

<sup>2</sup> (1991) 1 HKPLR 88, [1992] 2 HKCLR 127

<sup>3</sup> (1993) 3 HKPLR 72, [1993] AC 751



a criminal jurisdiction. It is true that if such a basis is used to measure "success", the Bill of Rights has achieved only a moderate level.

Since the commencement of the Bill in June 1991, counsel in the Attorney General's Chambers have appeared in close to 200 challenges to the validity of provisions of the criminal law -- some provisions having been the subject of repeated challenge, particularly in the Magistrates Courts. The number of successful challenges -- from the defence point of view -- is low, comprising the fall of just 8 provisions (5 mandatory presumptions, a provision which barred an appellant ordered to be re-tried from applying for costs, a provision for increased penalties on the basis that particular premises had been the subject of previous successful prosecution action -- and a single offence: section 30 of the Summary Offences Ordinance<sup>4</sup> -- "unlawful possession"). However, aside from challenges to the validity of criminal legislation, there have also been around 50 other criminal cases where the defence has sought to rely on the Bill of Rights for a remedy. This group of cases has largely been concerned with submissions that proceedings against a defendant should be curtailed because of some allegation that he cannot receive a "fair hearing" within the terms of article 10 -- the basis of such applications have been many and varied, the most popular submissions being based upon undue delay in bringing a defendant to trial; the absence of supposedly vital witnesses and assertions of discrimination. The "success rate" of such applications, while still low, has been considerably higher than challenges to the validity of provisions of the criminal law.

However, I repeat it would, in my view, be quite wrong to view the success of the Bill of Rights simply in terms of a scorecard of prosecution or defence "wins". Even where defence submissions under the Bill of Rights are unsuccessful in a particular trial, the consequences may have a far-reaching effect in ensuring that the conduct of criminal investigations and prosecutions is in line with the guarantees of the Bill.

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<sup>4</sup> Cap 228

I do not propose today to discuss in any detail particular Bill of Rights cases which have led to changes in practice and procedure -- the 20 minutes allowed for speakers is simply too short for the purpose. However a few general examples may illustrate my point.

***BAIL APPLICATIONS***

One of the first Bill of Rights cases back in 1991 concerned article 5(3) and what some refer to as a "right to bail". In fact, rather than such a "right", article 5(3) states that "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial".

In those carefree days for a prosecutor before the Bill of Rights, it was quite usual for the Crown to seek remand of an accused in custody simply based on assertions from the Bar table that the defendant was an terrible chap with an appallingly record of similar offences and the evidence in the present matter was overwhelming. Following the Bill of Rights and with the benefit of guidance from the High Court, prosecutors and police now have to work considerably harder to justify keeping an accused in custody. Evidence is required to back up claims that a defendant is likely to flee the jurisdiction before trial or there is a serious risk that he will interfere with witnesses. Arguably, the Bill of Rights has not changed the law applicable to bail applications -- merely served to remind all those involved in the system that locking up a man who is entitled to be presumed innocent until proved guilty is a very serious step. The end result is that both police and prosecutors now give much greater attention to justifying objections to bail - and if the justification cannot be properly made out, the defence will be successful in securing bail.

***UNUSED MATERIAL***

The prosecution is under a positive obligation to disclose all information in their possession which is relevant to the defence. Prosecutors are not free to pick out the available incriminating evidence against a defendant and simply ignore anything

which is favourable to him or casts a doubt on his guilt. Material which is relevant to a case in the possession of the prosecution, which the prosecution does not propose to use, must be made available to the defence. Like the principles applicable to bail, the Bill of Rights has not changed the law in this area -- merely emphasised the defendant's right to a "fair trial" (article 10) and reminded the prosecution of its obligations. In my experience, since the commencement of the Bill of Rights, both prosecutors and, particularly, law enforcement agencies have taken a much more rigorous approach to the disclosure of unused material -- no doubt, in part, because the defendant has also been reminded of his right to such material. The end result has been, in my view, a fairer system with a much greater awareness that the Crown must make full disclosure of relevant material.

#### ***FAIRNESS GENERALLY***

Aside from the specific subject of disclosure of unused material, the Bill of Rights has served to heighten awareness of prosecutors and law enforcement officers of the defendant's right to fair trial in many other ways.

There is, for example, a much greater concern than before the Bill of Rights as to the impact of delay in investigating offences and securing trial dates. Reasons for delay are now demanded from officers from the Police, the ICAC, the Customs and Excise and Immigration Services and it is made clear that, if necessary, such officers will be required to give evidence and be cross-examined in court as to their actions or lack thereof. Securing the right to trial without undue delay once an accused is charged is largely in the hands of the judiciary and its available resources. However, even here, the Attorney General's Chambers and the judiciary have co-operated to provide a formal system for securing an early trial date where, for example, a witnesses is at risk or there is some other pressing need for one case to take priority over others in the interests of a defendant.

Similarly, the Bill of Rights has encouraged all those engaged in enforcement of our criminal laws to give greater attention than previously to admissibility of evidence, the appropriate exercise of police powers and the avoidance of anything

which can be characterised as an abuse of process.

***SCRUTINY OF LEGISLATION***

Another area in which the Bill of Rights has had a major impact -- not confined to the criminal law -- is in relation to the examination of proposed legislation to ensure that it meets the guarantees of the Bill of Rights. The Attorney General certifies that each new Bill for introduction to the Legislative Council is, in his opinion, consistent with the Bill of Rights. This responsibility is taken very seriously indeed -- encouraged by a vigilant Legislative Council which often establishes sub-committees to consider Bills with particular reference to the Bill of Rights. These safeguards have yielded positive results on a number of occasions where Bills have been amended both before and after introduction to Legislative Council to resolve Bill of Rights concerns.

It is difficult -- indeed impossible -- to quantify the beneficial effects that the Bill of Rights has had on the criminal justice system. In my view, they are very substantial indeed and it would be a grave disservice to evaluate the success or failure of the Bill of Rights merely by reference to the number of successful defence challenges in courts. Indeed a low number of challenges may well be indicative of the fact that the Bill of Rights is working to ensure our criminal justice system is fair both in terms of the substantive law and the procedures adopted to enforce it.

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## THE NON-IMPACT OF THE BILL OF RIGHTS IN THE CIVIL AREA

GLADYS LI QC<sup>1</sup>

Those of us who saw the Bill of Rights Ordinance (Cap 383) through the stages of conception and development "in utero" realised long before its birth that this was not to be the Ordinance which, to paraphrase the beer ad, would refresh the parts of the law which other Ordinances could not reach. The "Off Limits" sign was staked on several important areas of law and on several Ordinances from which it is reasonable to infer that those were the areas and Ordinances most in need of refreshing. However, there was room for cautious optimism that with a generous purposive approach from the judiciary, the Bill of Rights would make a difference.

Speaking for myself, those hopes were dented by the tone of Sir Derek Cons' speech at the Bill of Rights Seminar in June 1991 which struck me at the time as viewing the Ordinance almost entirely from the "trade-union boss" perspective: "It'll make more work for the lads". The fear of being swamped with litigation may unconsciously have influenced the Court of Appeal judges who heard the case of *Tam Hing-yea v Wu Tai-wai*.<sup>2</sup> Whether or not it did, the result was as the Court of Appeal accepted that the Ordinance did not comply with the intention expressed in its preamble of incorporating into the law of Hong Kong provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong (ICCPR).

In interpreting the words in section 7 of the Ordinance that the Ordinance "binds only the Government and all public authorities", the Court of Appeal took the legislature clearly to have intended that private individuals should not be adversely affected by the Ordinance. Therefore, even though a provision may be repealed under section 3 as being inconsistent with the Bill of Rights, it is only

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<sup>1</sup> Barrister; Acting Chair, JUSTICE (Hong Kong Branch of the International Commission of Jurists)

<sup>2</sup> (1991) 1 HKPLR 261, [1992] 1 HKLR 185

repealed to the extent that the party directly seeking to rely on the provision is the government or a public authority, not a private individual. The Court of Appeal found nothing strange in the concept of a provision being repealed with regard to one section of the community but not with regard to the rest.

Since the Ordinance does not incorporate the ICCPR into domestic law in this respect, and given the administration's commitment to implementing the ICCPR as applied to Hong Kong, there can be no possible objection to the administration putting forward an amendment to the Bill of Rights Ordinance to overturn this unfortunate decision.

While this decision may have played its part in keeping Bill of Rights' cases out of the courts, cost is clearly a major deterrent factor. Where no commercial interests are at stake, who is going to take the risk of litigating over a right whose precise ambit is uncertain as a matter of principle?

Many would argue that this provides a necessary brake on litigation. However, the situation is highly unsatisfactory given the government's stock response to criticism of this or that provision as not being in conformity with the Bill of Rights. It is essentially as follows:

"We've reviewed existing legislation and we've amended or removed the real offenders. If you think there are any others we'll see you in court". But the government rests reasonably secure that save in the field of criminal law it is unlikely that their view will be challenged in the courts. Why unlikely; after all, there is always legal aid.

Yes. In theory, there is always legal aid. The case of Lee Miu-ling<sup>3</sup> who is seeking to challenge the legality of the functional constituency system of election to the Legislative Council may be known to some of you. It might be argued that her case is proof that it is possible to obtain legal aid to sue the government in a case which does not directly involve personal liberty and where no monetary relief is sought. Had she not persisted by appealing the refusal of legal aid and had she

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<sup>3</sup> See the decision of the High Court in *Lee Miu-ling v Attorney General* (1995) 5 HKPLR.

not had the benefit of voluntary legal assistance and representation, it is clear that the result would have been different.

The Legal Aid Department having refused her legal aid principally on the ground that even if she succeeded, she would obtain a "trivial advantage" only, vigorously resisted the appeal. Under section 9(d) of the Legal Aid Ordinance, the Director has the power to refer the application or any matter arising out of the application to any counsel or solicitor on the legal aid panel to give an opinion on it. That power is frequently used and in the light of such independent opinion, the Director will decide whether to grant or continue legal aid. Yet in the case of Lee Miu-ling, such a power was not used until after her appeal had commenced and then only at the insistence of the Master hearing the appeal that the provision be used.

This minor triumph does raise questions about the other cases in which legal aid has been refused on the same ground namely that the relief sought would bring a "trivial advantage" to the applicant. If I recall correctly, the Legal Aid Department has admitted to refusals in 15 applications where applicants were seeking to establish some point under the Bill of Rights. As the government is or claims to be committed to the rule of law, it is to be assumed that a declaration by a court that a particular provision had been repealed for non-conformity with the Bill of Rights would normally be respected by the government. Yet the officers of the Legal Aid Department apparently consider this to be a trivial advantage.

Were these applications also rejected on the ground that the Bill of Rights points raised were unarguable as in Lee Miu-ling's case without the benefit of an opinion under section 9(d)? Was the fact that there might be others in the applicants' situation and others who might "benefit" from any action brought used by the Legal Aid Department as in Lee Miu-ling's case not as an argument in favour of granting the application but against them?

It may be that the Legal Aid Department has on its own devised these bizarre criteria or it may be that it has been pushed to do so by the holders of its purse strings. Interference by the administration in the handling of legal aid applications



may not be common place but neither is it unknown. In 1991, the then Director of Legal Aid reached an "agreement" with the then Crown Solicitor on the handling of applications for legal aid by Vietnamese detainees who wished to challenge the screening process. The agreement was reached on the basis of the preference expressed by the Secretary for Security for cases where some identified procedural defect existed to be handled by administrative means rather than by resort to the courts.

If the administration has had a hand in devising the policy of refusing legal aid to applicants where questions of personal liberty or monetary relief are not involved, then its stance of requiring a successful challenge in the courts to be mounted is the most cynical imaginable. I am by no means suggesting that litigation is the best or only method of getting the government to comply with the Bill of Rights but if the government will only act if sued, then funding must be made available to make legal challenge a real not just a theoretical option and arguable cases allowed to go forward. Otherwise, where personal liberty or commercial interests are not involved, the government will be the sole arbiter of the rights to be enjoyed under the Bill of Rights by the people of Hong Kong and by those who are subject to its laws.

Apart from "inter-citizen" rights, the major area which remains beyond the reach of the Bill of Rights is that of immigration law and practice where persons not having the right to enter and remain in Hong Kong are concerned. The reservations made by the United Kingdom government to the application of the ICCPR in this area are to be found in sections 11 and 12 of our Ordinance. "Not being bound to apply the ICCPR" does not have to mean "bound not to apply the ICCPR". Xenophobia combined with total administrative discretion in the area of immigration is a dangerous mix. An appeal system for those not having the right to remain should be considered.

Extensive powers of administrative detention exist under various sections of the Immigration Ordinance and, save under section 26 (pursuant to which a person may be detained for a limited period for inquiry if an immigration or police officer

above a certain rank is satisfied that the person may abscond), there is no requirement that the detention is necessary or any consideration be given to the risks of absconding. There is no presumption in favour of liberty.

Under section 32, unlimited detention *is possible pending* removal and under section 32(4), detention of a person who is to be removed or who is subject to a removal or deportation order is permitted for the purpose of his giving evidence at the trial of any offence or for facilitating inquiries into any offence or suspected offence.

A tourist who happened to be the victim of a criminal offence in Hong Kong would no doubt be offered certain options if his or her evidence were required at any subsequent trial of which I am sure imprisonment would not be one. Yet illegal immigrants, it seems, are some sub-human species. Because they can be detained anyway pending removal, there is no harm in keeping them incarcerated for reasons of administrative convenience. They are of course brought before a court every 21 days but legal aid is not available for them to be legally represented and there is no requirement that their evidence be essential or the offence for which their evidence may be required be a serious one.

This provision is a gross violation of human rights and the sooner it is repealed the better. Meanwhile if the evidence of persons who have no right to remain in Hong Kong is required for any trial, alternatives to imprisonment must be found.

Finally, I had intended that this paper should be an unsolicited preamble to Anna Wu's paper because as I see it some of the problems which I have addressed would have been solved by the establishment of a Human Rights Commission of the kind envisaged by Anna's Bill. It now looks as if we should be holding an annual event to commemorate the stillbirth of the Human Rights Commission. Anna may be kicking this off with a paper re-titled "Why a Human Rights Commission would have been nice".

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**SESSION III:**

***THE FUTURE OF THE BILL OF RIGHTS***



# THE BILL OF RIGHTS AND THE BASIC LAW: COMPLEMENTARY OR INCONSISTENT?

YASH GHAI<sup>1</sup>

## 1. THE BILL OF RIGHTS ORDINANCE

### (a) *The Contents of the Ordinance*

The Bill of Rights Ordinance ("Ordinance")<sup>2</sup> was enacted in June 1991. It follows very closely the substantive terms of the International Covenant on Civil and Political Rights ("Covenant") which was applied to Hong Kong in 1976. The Covenant was applied to Hong Kong by the British with a number of reservations, eg, that the legislature and the executive would not necessarily be democratic or based on one person one vote. The Ordinance is based on the Covenant without those provisions to which Britain had entered a reservation.

The rights guaranteed by the Ordinance are many.<sup>3</sup> Some of these rights

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<sup>1</sup> Sir Y K Pao Professor of Public Law, University of Hong Kong

<sup>2</sup> Cap 383

<sup>3</sup> These rights are the: (1) entitlement to the rights of the Ordinance without discrimination such as those based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; (2) right to life; (3) prohibition of torture, inhuman treatment, slavery or imprisonment for inability to fulfil a contractual obligation; (4) right to liberty and security of the person; (5) right of persons deprived of their liberty to be treated with humanity and respect; (6) right to liberty of movement; (7) right to a fair hearing before a person may be expelled from Hong Kong; (8) equality before the courts and the right to a fair and public hearing; (9) prohibition of retrospective criminal offences or penalties; (10) right to recognition as a person before the law; (11) protection of privacy, family, home, correspondence, honour and reputation; (12) freedom of thought, conscience, religion, association, opinion and expression; (13) right of peaceful assembly; (14) right to marry and found a family, prohibition of forced marriages, and equal rights of spouses in marriage; (15) right of every child to the protection of law as is justified by his or her status, and to

appear to be granted in absolute terms, while others may be limited by criteria laid down in the Ordinance. The only truly absolute rights are the prohibition against torture, inhuman treatment and slavery or servitude, and imprisonment for failure to fulfil a contract. Some others may seem absolute, but reasonable restrictions on them are allowed (eg, the right to equality or the presumption of innocence). Some rights are protected against arbitrary restriction or deprivation (eg, right to life, or unlawful interference with privacy, family, home or correspondence). Others may be restricted to protect national security, public order, public health, morals, or the rights and freedoms of others. These are: freedom of movement, freedom to manifest one's religion or beliefs, freedom of expression, right of peaceful assembly and the freedom of association.

The effect of the provisions about restrictions on rights is that they ensure that the government must act reasonably and in good faith, and that the legislature must carefully assess social needs and impose restrictions no wider than strictly necessary to meet these needs. In this way the rules about restrictions ensure efficient but fair administration.

Section 5(1) provides for wider restrictions in the situation of an emergency.<sup>4</sup> An emergency can be called only for serious threats to the "nation" (which

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registration after birth and to a name; (16) right of every permanent resident to take part in the conduct of public affairs, directly or through chosen representatives; to vote and contest elections; and to have equal access to the public service; and (17) right of minority communities to enjoy their own culture, profess their religion and use their own language.

<sup>4</sup> Section 5(1) provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, measures may be taken which derogating from the Bill of Rights to the extent strictly required by the exigencies of the situation, but these measures shall be taken into accordance with law."

presumably means the Hong Kong Special Administrative Region ("HKSAR") in this context). The restrictions must be provided for by law, and must be rational and proportionate, although the courts are likely to allow the legislature and the executive wider latitude in determining what is rational and proportionate than in ordinary times.

Article 5(2) imposes further limits on the extent to which restrictions may be placed on rights during an emergency. First, they must not be inconsistent with Hong Kong's obligations under international law (other than the Covenant itself). Secondly, they must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Thirdly, the following rights cannot be derogated from (apart from any limitations expressly allowed in the Ordinance itself): the right to life; protection against torture or inhuman treatment; protection against slavery or servitude; prohibition against imprisonment for breach of contract; prohibition against retrospective criminal offences or penalties; the right to recognition as a person before the law; and the freedom of thought, conscience and religion.

**(b) The status and effect of the Ordinance**

Although the purpose of the Ordinance is to implement the Covenant, it does not enjoy any special status. It is an ordinary Ordinance of the legislature, whose effect on other laws is determined by the normal rules of the common law. This means that laws passed previously to the enactment of the Ordinance will be affected by it, but that future laws will not. A general rule is that those who have to interpret different laws or statutes--whether administrators or judges -- should aim to interpret them in such a way that the laws or statutes are consistent with one another. But if it is not possible to so interpret them, then the later statute will prevail over the previous. These rules of interpretation are expressly incorporated in the Ordinance. Section 3 says of legislation prior to the Ordinance:

- "(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a



construction.

- (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed."

Section 4 deals with the effect on legislation passed after the Ordinance and says:

"All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong."

The effect of this section is that while attempts will be made to interpret subsequent legislation in such a way that it does not conflict with the Ordinance (since the Ordinance sets out the Covenant as applied to Hong Kong), if the legislation is clearly in conflict with the Ordinance, that legislation and not the Covenant will apply.

The Ordinance does not therefore in any way limit the powers of the legislature. However, an amendment to the Letters Patent made at the same time as the Ordinance was passed gives a superior status to the Covenant. That amendment now appears as article VII(3).<sup>5</sup>

The Letters Patent therefore entrench the Covenant and not the Ordinance directly. In a case where the validity of post-1991 legislation is in question, the

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<sup>5</sup> Article VII(3) provides:

"The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent 1991 (No 2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong."

court may look, for convenience, to the Ordinance as an authoritative account of the Covenant as applied to Hong Kong within the terms of the Ordinance. But in law it is the Covenant which might affect the application of a post-1991 Ordinance, and not the Bill of Rights Ordinance. This position was taken by the High Court in *R v Lum Wai-ming*<sup>6</sup>, which concerned the validity of a post-Bill of Rights Ordinance legislation -- the Dangerous Drugs (Amendment) (No 2) Ordinance 1992 -- which referred to the Letters Patent and not the Ordinance to determine the validity.

Even if it may be argued that the Letters Patent entrench the Ordinance, *the position after 30 June 1997 will be that the Ordinance will lose the protection of the Letters Patent which under article 8 of the Basic Law will cease to be part of the law of the HKSAR*. The Ordinance will be ordinary legislation. It will not control subsequent legislation and will not by itself restrict the legislative competence of the HKSAR legislature. In fact, the validity of its own provisions will be determined by the Basic Law, which will be superior to ordinary legislation. After 30 June 1997 the validity of all laws will be determined by the Basic Law, not the Ordinance.

## **II THE HUMAN RIGHTS PROVISIONS OF THE BASIC LAW**

The continued application of the Ordinance after 30 June 1997 depends on its compatibility with the Basic Law. Article 8 provides that all pre-1 July 1997 Ordinances will continue to apply unless they are incompatible with the Basic Law. Article 160 gives the Standing Committee of the National People's Congress ("NPCSC") the power to determine, on the establishment of the HKSAR on 1 July 1997, which Ordinances (or parts thereof) are inconsistent with the Basic Law. Therefore it is necessary to examine if the Ordinance is inconsistent with the Basic Law. In order to do so it is necessary to see if the Ordinance is inconsistent with any of the provisions of the Basic Law, particularly its own provisions for the

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<sup>6</sup> (1992) 2 HKPLR 182, [1992] 1 HKCLR 221

protection of rights, and whether it limits the powers of the legislature and the executive given under the Basic Law.

The Basic Law protects rights in two ways: (a) it lists specifically a number of rights and (b) it provides protection through the "indirect" incorporation of the Covenant (article 39). Chapter III of the Basic Law lists a number of rights, but further rights are provided in other parts of the Basic Law. Most of the rights are available to all residents of HKSAR.<sup>7</sup> Some are restricted to permanent residents with a right of abode.<sup>8</sup> Others are restricted to permanent residents who are Chinese nationals who have no right of abode elsewhere. In addition, the indigenous inhabitants of the New Territories enjoy some special rights.

Most rights are expressed in absolute terms. Those which are not may have

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<sup>7</sup> The following rights are available to all Hong Kong residents: (1) equality before the law; (2) freedom of speech, press and publication; (3) freedom of association; (4) freedom of assembly, of procession and of demonstration; (5) the freedom to join trade unions and to strike; (6) the freedom and liberty of the person; (7) prohibition of torture; (8) prohibition of unlawful or arbitrary deprivation of life; (9) privacy of person and home; (10) the freedom of movement within HKSAR as well as to enter or leave Hong Kong; (11) the freedom of conscience and religious belief and practice; (12) the freedom of occupation; (13) right to engage in academic research, literacy and artistic creation and other cultural activities; (13) the freedom of marriage and the right to raise a family; (14) the protection of the law and the legal process (including access to confidential legal advice and legal service, access to courts, and to judicial remedies including against the executive authorities and their personnel); (15) the presumption of innocence; (16) the right to a speedy and fair trial; (17) common law procedural safeguards in civil and criminal trials; (18) the right to own and enjoy property and protection against its confiscation without compensation; (19) and the right to social welfare. In addition, the Basic Law protects the role of non-governmental organisations in religion, education, health, culture and sports.

<sup>8</sup> The additional rights of permanent residents are those to stand for and vote in elections; and in principle only they may be appointed to public services.

a formula "in accordance with the law" (the right to vote and stand for elections; the right to social welfare) or a reference to "unlawful" or "arbitrary" (freedom and liberty of person; privacy of home or correspondence). It may be assumed that despite the absolute language, rights may be qualified, and for the criteria for restrictions are to be found in the second paragraph of article 39 to which I now turn, one of which is that restrictions must be prescribed by law.

The second method of protection is by stipulating that the Covenant as applied to Hong Kong shall remain in force and that it shall be implemented through the laws of the HKSAR (article 39). The second paragraph of the article goes on to say that:

"The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the preceding paragraph of this Article."

The result of article 39 would therefore seem to be that the rights in the Covenant as applied to Hong Kong are to be enforced in the HKSAR and that they are to be implemented through domestic laws. And secondly, that the restrictions on rights must, to be valid, satisfy the criteria established in and under the Covenant. The Covenant is therefore entrenched and acts to limit the legislative and executive powers of the HKSAR.

Like the Ordinance, the Basic Law also provides for restrictions on rights in an emergency. Article 18 says that if the NPCSC decides to declare a war or decides, "by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity and is beyond the control of the government of the Region" it may declare an emergency and apply the "relevant national laws" in the HKSAR. The grounds for declaring an emergency are thus similar to those under the Ordinance, but without a detailed examination of the relevant Chinese law, it is difficult to say whether the permissible restrictions are also similar. Article 18 seems to assume that national emergency laws will apply only after HKSAR's emergency laws have failed to bring the situation under control.

Finally, there are some restrictions on rights that are expressly authorised under the Basic Law. There are various derogations from the principle of equality, as there are different categories of residents bearing different rights (including indigenous inhabitants of the New Territories). One person-one vote type of democracy has been postponed beyond the foreseeable future. Thirdly, article 23 requires the HKSAR to enact laws which would have the effect of restricting various rights--those of free expression, assembly, and political participation.<sup>9</sup>

Many of the restrictions implied in this article would be justified under the normal rules for limitations on rights, although the blanket prohibition on contacts of HKSAR bodies with foreign political bodies may be questionable under international rules. However, even here a great deal will depend on how "political" is defined (as the Basic Law allows HKSAR non-governmental organisations "in fields such as education, science, technology, culture, art, sports, the professions, medicine and health, labour, social welfare and social work as well as religious organisations" to "maintain and develop relations with their counterparts in foreign countries and regions and with relevant international organisations", article 149). The restrictions allowed under article also depend on how widely sedition or state secrets, etc. are defined. It must be remembered that under article 23 these laws are to be made by the HKSAR, that article 11 says that the HKSAR cannot make any laws which contravene the Basic Law, and that article 39 is to the effect that no restrictions on rights should contravene the Covenant as applied to Hong Kong.

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<sup>9</sup> Article 23 reads:

"The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies."

### III THE COMPATIBILITY OF THE ORDINANCE WITH THE BASIC LAW

Before turning to this question, it may be useful to state some general conclusions that flow from the above discussion.

(1) There is very considerable overlap between the rights given in the Ordinance and the Basic Law. However, the overlap does not result in the inconsistency of the Ordinance with the Basic Law. It is not unusual in most legal systems (including China and Hong Kong) to have overlaps.

(2) In some respects the rights in the Ordinance and the Basic Law supplement one another. In so far as the Basic Law has rights not provided under the Ordinance (these include rights to jury trial, property and social welfare) this poses no problem as far as the consistency between them is concerned.

(3) The fact that the Ordinance has rights which are not mentioned expressly in the Basic Law (these include the prohibition against slavery and servitude, the right to recognition as a person, and the rights of minorities) does not create an inconsistency since the Basic Law provides that "Hong Kong residents shall enjoy other rights and freedoms safeguarded by the laws of the HKSAR" (article 38). In this way the Basic Law recognises that Hong Kong residents may enjoy rights and freedoms additional to those specified in the Basic Law itself.

(4) However, it is not clear that the Ordinance confers any rights which are additional to the Basic Law. For apart from expressly specifying some rights, the Basic Law incorporates in article 39 all the rights in the Covenant as applied to Hong Kong (which are the rights in the Ordinance). Article 39(2) makes it clear that restrictions of rights under the Basic Law must meet the same criteria as that in the Ordinance--thus there are no inconsistencies which might otherwise arise from differential scope of limitations.

(5) It is necessary to refer to those provisions of the Basic Law which might be seen to conflict with the Ordinance.

(a) One of them is the protection of the traditional rights of the indigenous inhabitants of the New Territories (which not be consistent with the equality provisions of the Ordinance). The only justification for these rights appears to be

that they are historical, but it is unlikely that that would be a sufficient justification under the Ordinance.

(b) The various provisions on the exclusive rights of Chinese nationals who are permanent residents of Hong Kong without a right of abode in a foreign country might seem at first sight to be a violation of the equality provisions of the Ordinance. However, these special rights are not difficult to justify either under general principles of preference for nationals in political rights prevailing in almost all states or on rational grounds (as only persons with unequivocal links to the HKSAR should exercise these rights). It is probable therefore that these provisions do not conflict with the Ordinance.

(c) There may be a clash between the Ordinance and article 23--as mentioned above, whether there is or not would depend on the way in which article 23 is implemented. Most of the restrictions implicit in article 23 would be justifiable under the tests of legitimate objectives, rationality and proportionality. Doubt may remain about the ban on political ties with foreign political organisations or bodies. Unless "ties" is defined to include all contacts, that ban too may be justifiable under the Ordinance.

It could be argued that when the HKSAR legislates to implement article 23 it has to be mindful of article 39 (since its own legislative power has to be exercised within the framework of the Basic Law). If this line of approach is valid, then there is no clash between article 23 and the Ordinance.

(d) There may be some clash between the respective provisions on emergency powers. I have argued above that the reasons for the invocation of emergency are not in conflict, but the actual powers that may be exercised may conflict--but this depends on the relevant national laws to be applied. If one takes the line that national laws will be applied only after all HKSAR powers (including emergency powers) have been exercised and found wanting, the two sets of emergency powers can be regarded as sequential (this will obviate some conflicts). In so far as powers under relevant national laws are wider than would be permissible under the Ordinance, the validity of these powers would be determined

by the Basic Law and not the Ordinance. In this way one can argue that the restrictions on emergency powers in the Ordinance refer to the powers exercisable by the HKSAR government in the ordinary way, but that these restrictions are ousted once greater powers are authorised by the NPCSC. In this approach, even on this point there is no conflict.

(e) If these attempts to reconcile the Basic Law and the Ordinance are rejected, it does not follow that the whole of the Ordinance is inconsistent with the Basic Law, and must therefore be repealed. The repeal is only to the extent of the inconsistency. It is a well accepted norm of jurisprudence that only those parts are repealed which are inconsistent, unless of course the statute would make no sense without the parts which are repealed. This view was adopted by the Court of Appeal in *R v Sin Yau-ming*<sup>10</sup> and implicitly by the Privy Council in *Attorney General Lee Kwong-kut*.<sup>11</sup>

(f) Article 39 of the Basic Law maintains in force the Covenant as applied to Hong Kong and requires its implementation in the laws of Hong Kong. The Ordinance does precisely that. It would be strange for the NPCSC to repeal the Ordinance, and for the HKSAR legislature to give effect to the Covenant (as it is required to do) in identical or largely identical form as the repealed Ordinance.

(g) Even if the Ordinance is repealed, the Covenant will remain in force under article 39. Thus all the rights under the Ordinance will still apply, even if not through the Ordinance. All the laws of Hong Kong will remain subject to the Covenant.

(h) The conclusion in law therefore is that the Ordinance does not contravene the Basic Law.

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<sup>10</sup> (1991) 1 HKPLR 88, [1992] 2 HKCLR 127

<sup>11</sup> (1993) 3 HKPLR 72



### III POLITICAL CONSIDERATIONS

A few arguments have been raised against the continued the application of the Ordinance which are based on largely political factors, which are considered below.

(a) It is sometimes alleged that the Ordinance has affected significant changes in the legal and political system of Hong Kong contrary to the Joint Declaration and the Basic Law. Various laws have been held to be invalid as a consequence of its enactment, and some key legislation has been amended to remove administrative controls over rights of assembly, process, association, and regulate the powers of the ICAC. The Ordinance has also altered the balance between the judiciary on the one hand and the legislature and the executive on the other. It has been alleged that these changes violate the provision (and understanding) of the Joint Declaration that "the laws currently in force in Hong Kong will remain basically unchanged" (article 2(3)) and that "the current social and economic systems in Hong Kong will remain unchanged, and so will the life-style" (article 2(5)). The Basic Law also has several references to the maintenance of previous laws and systems (eg, articles 5, 8, 18, 19, 40, 65, 81, 86, 87, 91, 94, 94, 144, 145). A related allegation is that the Ordinance and its consequences have seriously weakened executive authorities, and thus violate the Basic Law principle of an "executive-led" political system.

These arguments need to be assessed carefully. The Basic Law has preserved expressly many features of the "previous system" (especially in providing a powerful executive, and in the economic and social systems). "Executive-led" is not a term of art, and its structure and implications are to be gathered from the specific terms of the Basic Law, rather than from other modes of interpellation or arguments from principles. References to "previous laws" or "systems" are used in the Basic Law with varying effects: in some instances they are intended to entrench a previous law (as with the rights in civil and criminal trials, article 87); in other instances they are to provide guidance to the HKSAR (eg, article 108, low tax policy); sometimes they are to indicate broad parameters of policies or relationships (as with education or the role of NGOs). Nor is the Basic Law a charter for total

conservation of old laws and institutions. It establishes, for Hong Kong, an ambitious political agenda whose implementation requires fundamental changes from the old colonial system both during and after the transitional period. More generally, it is important to distinguish essentials from mere matters of detail as to change, and the essentials are to be gleaned from the General Principles in the Basic Law and China's Basic Policies to Hong Kong from the Joint Declaration. It will be clear from them that the protection of human rights is fundamental to both. The Basic Law guarantees many rights as well as entrenching the Covenant. The enactment of the Ordinance and the revision of various laws, far from undermining the logic of the Basic Law, is in strict conformity with and furtherance of its objectives.

(b) Another argument is that the Ordinance has created uncertainty in the law due to the litigation that has resulted, particularly in areas where law and order may be affected (eg, presumption of innocence, delays in trials, rights of refugees). It is an inevitable result of the introduction of legal guarantees of rights that doubts on the validity of some previous laws will arise, and, as in Hong Kong, where the question of rights can be litigated even in lower courts, that differing views on this question may be advanced. The experience of other countries which have introduced a Bill of Rights in recent years illustrates this: India, Canada, New Zealand, UK (through its adherence to the supervisory mechanisms of the European Convention on Human Rights) etc. However their experience also shows that after the first few years many doubts and controversies are settled as the administration and courts develop general principles. This appears to have happened in Hong Kong as well. The Privy Council and the Court of Appeal have begun to establish these principles, emphasising the need to balance the rights of residents with the overall good of society.

Certainty is also enhanced by two other factors: (i) many provisions that may be regarded as of doubtful validity have already been litigated; and (ii) the Hong Kong administration has, after several years of study, identified Ordinances which may be in conflict with the Ordinance and amended most of them. These

developments have narrowed the scope of uncertainty.

In one way it is good for the smooth transition of sovereignty that these controversies are settled now. For they can arise even under the Basic Law; indeed two of the most litigated rights, the presumption of innocence (concerning the burden of proof) and fair and speedy trial, are also provided for in the Basic Law. And under article 39 (2) restrictions on the rights of residents can be challenged by reference to the Covenant. If all these questions were to arise for the first time after the transfer of sovereignty, it would indeed affect the smooth transition and may give the impression that it is only after the establishment of the administration of Hong Kong under Chinese sovereignty that rights have begun to be infringed.

(c) It is sometimes argued that the effect of the Ordinance, through legislative changes and judicial decisions, is such that administration will become difficult as important executive powers will cease to exist. There is very little evidence for this. Numerous countries, with rights more extensive than in the Ordinance, have experienced no particular difficulties. On the contrary, the legal protection of rights have assured the people and increased their loyalty to the state.

The Ordinance has been in force for over three years, but there is no sign of a breakdown in administration. The senior courts have shown a realistic attitude towards the application of the Ordinance. Key police powers have remained intact as have those of the ICAC. If in future it is considered necessary to assume powers that have been repealed, the HKSAR legislature will not be prevented by the Ordinance from doing so. The validity of such legislation will be governed by the Basic Law only. Legislation will need to be enacted under article 23 when undesirable political links of Hong Kong organisations with foreign organisations will be banned.

(d) The courts of the HKSAR will not be bound by the decisions of the Hong Kong courts or the Privy Council. They will be of persuasive authority, but the Court of Final Appeal will be free to depart from them in case it is convinced that they were wrongly decided. It is also important to remember that after 30 June 1997 the ultimate responsibility for the interpretation of the Basic Law will lie with the

NPCSC.

(e) The repeal of the Ordinance will not revive legislation which has been amended or declared by courts to be invalid (this follows from the general principle of the common law as well as Chapter 1 of the Laws of Hong Kong). It will be necessary for the legislature to enact fresh legislation -- which it can also do even if the Ordinance is not repealed, since the Ordinance will not apply directly to it.

(f) Thus little will be achieved by the repeal of the Ordinance. On the other hand, its repeal will confuse the people, cast doubt on the scope of article 39 of the Basic Law, create uncertainty in the law, but in political terms, it will be interpreted as evidence of the lack of commitment of China to rights and freedoms of the residents of Hong Kong and thus ultimately to the Basic Law and "One Country Two Systems". It will also send the wrong signals internationally.

#### **IV SUMMARY CONCLUSION**

It would seem therefore that on both legal and political grounds, it would be a mistake to repeal the Ordinance. Colonialism has rightly been associated with the oppression of the people. The Ordinance seeks to restore to the people the rights that colonialists took away. It would be unfortunate if the resumption of sovereignty over Hong Kong by China were seen to be marked by a similar oppression.

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# HUMAN RIGHTS IN POST-1997 HONG KONG

GARY CHENG KAI-NAM<sup>1</sup>

The rights and freedom of the people of Hong Kong after 1997 are primarily guaranteed on three fronts. <sup>①</sup> The first is the Basic Law itself, particularly the stipulations enshrined in its Chapter 3. <sup>②</sup> The second are the stipulations of the two international Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) relevant and applicable to Hong Kong. <sup>③</sup> The third is the preservation of Hong Kong's existing laws.

The above three overlap to a great extent. For example, the Basic Law provisions are essentially written to preserve and respect the rights currently enjoyed by the people of Hong Kong. Indeed these provisions are based upon the Sino-British Joint Declaration but with further improvement. <sup>④</sup> An example is the insertion -- in response to heavy demand from the labour groups -- of the word "right" in the Basic Law to allow labourers to organize strikes and unions despite the disuse of such a similar word in the Joint Declaration.)

Personally, I do not think that the passing of the (Bill of Rights Ordinance<sup>2</sup> will necessarily contravene with the Basic Law.)

⇒ The reason is that the Bill of Rights is virtually drafted in accordance with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. <sup>⑤</sup> (The objective is to materialize the spirit of the Covenant through Hong Kong laws. This not only preserves the contents of this Covenant already incorporated into Hong Kong's laws, but also sets the guideline after 1997 for new Hong Kong Special Administrative Region laws, to which we could apply the wording wed in article 39 of the Basic Law, ie the international Covenants "as applied to Hong Kong shall remain in force and shall

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<sup>1</sup> The Democratic Alliance for Betterment of Hong Kong

<sup>2</sup> (Cap 383)

be implemented through the laws of the Hong Kong Special Administrative Region."

Literally importing the language from the two international Covenants, however, gives rise to new problems because the two Covenants are expressed in relatively (abstract and broad language). Therefore, the direct incorporation of these words into our law will increase the (possibility of controversies). It appears that this is going to be an important subject for the legal profession to explore from now on.

There has been a concern that the Bill of Rights might supersede the Basic Law. However, article 11 of the Basic Law states that any law enacted in Hong Kong should not transgress the Basic Law. Therefore, should this happen to the Bill of Rights, the Basic Law should take precedence.

It should be noted that since the Bill of Rights was passed in the Legislative Council as part of the normal legislative process, problems as to whether the bill overshadows the Basic Law should not arise.

Article 17 of the Basic Law states: "Laws enacted by the legislature of the HKSAR must be reported to the Standing Committee of the National People's Congress for the record. The reporting for record shall not affect the entry into force of such laws". In other words, only when the bill transgresses the Basic Law will China invoke article 160 of the Basic Law to annul it. Of course, as a legislative body, the HKSAR legislature could pass a law to annul the bill in this situation. However, in respect of the issue whether article 39 of the Basic Law is as constitutionally binding on the administration and the entire body of law as the recently amended Letters Patent, I believe that as that article expressly states that provisions in the ICCPR and ICESCR as applied to Hong Kong shall remain in force, it should be equally constitutionally binding.

But one thing is certain. My colleagues at the Democratic Alliance for Betterment of Hong Kong and I disagree about proposals regarding rescinding the Bill of Rights Ordinance after 1997.

The Preliminary Working Committee was once rumoured to have discussed the idea of abrogating the Bill of Rights. But later it was revealed that there was

only one Provisional Working Committee member who raised the idea during a meeting. This does not represent the position of the entire PWC. However, PWC member Mr Li Fook-sin, who was once said to be the individual who put forth this idea, finally had the opportunity to clarify his stance during a meeting the PWC political panel had with the Hong Kong Affairs Advisers in Hong Kong last month. He asserted that he had not proposed any such idea.

However, when it comes to substantiating the promise pledged in the Basic Law with regard to its provisions on human rights, we notice that China is not yet a signatory to the ICCPR and the ICESCR. While her sovereign state China has not yet signed the two international Covenants, the Hong Kong Special Administrative Region has already allowed the two Covenants to apply to the territory. If China could become a signatory to the ICCPR and ICESCR, this would boost Hong Kong residents' confidence in their human rights.

Last month during the PWC political panel's visit in Hong Kong, the Democratic Alliance for Betterment of Hong Kong presented a formal request to Hong Kong and Macau Affairs Office officials, including director Mr Lu Ping, that China sign the two Covenants. Without turning down the request, the Chinese officials said that the Chinese government was considering the idea. ]

A former Basic Law Consultative Committee member and now an Executive Councillor once stated that China's persistent hassle over and hairsplitting attitude towards each word to be used in the Basic Law during the drafting period should give us something to hold on to to believe in our future because it shows that China is playing the game by the rules. If China had been indifferent to all the controversial issues, this would lead those without confidence to cast doubt on China's sincerity to make good of her promise to protect Hong Kong people's rights after 1997.

I consider that what makes Hong Kong a world-famous success story are her sufficient time and room to develop her industry and trade, and most importantly her efficient judicial system.

During the latter period of the transition, it is inevitable that controversial



issues such as human rights are inclined to be tangled with political and emotional elements. Yet, if we have faith in the rule of law, what we should and can do is to rationalize these issues. Since Hong Kong's transition toward a "One Country Two Systems" model is an unprecedented experiment in history, I do prefer to see us not making too many pessimistic assumptions and hypotheses so that we slowly fall into the trap of a "self-fulfilling prophecy". Rather we should encourage both Chinese officials and Hong Kong residents to work together with a positive attitude to make the experiment bear fruit.

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**HUMAN RIGHTS --**

**RUMOUR CAMPAIGNS, SURVEILLANCE AND DIRTY TRICKS**

**AND THE NEED FOR A HUMAN RIGHTS COMMISSION**

**ANNA WU HUNG-YUK<sup>1</sup>**

Rumour campaigns are a standard technique employed by this government and, I am sure, by other governments as well. In some cases these are used to depress public expectation, to stir up or stifle a demand or to cause a division in the community. In other cases they may be used to smear targets and to discredit them.

It is obvious that a government would always want its own view to be put across and supported. A government would also want to manipulate public opinion so that it can point to public opinion to justify its own actions.

Some cynics would say, so what is wrong with that. Is not that what public relations officers do? They put the best possible interpretation on events that may be embarrassing, they control damage, and, when necessary, they resort to a little creativity in assembling the facts. But there is a difference between a public relations company and the government.

The government is supposed to stand up for our interests. It is supposed to listen to our views and to encourage the expression of views, however different. A government is not supposed to control public opinion by leading it, channelling it or, when it suits its purpose, ignoring it so as to make its own job easier. It is not meant to manipulate and distort public opinion. It is not expected to violate rights or to seek to hide them or attempt to defend them on spurious "public interest" grounds.

One example of the government's attempt to manipulate and make use of public opinion were the two government-sponsored opinion surveys in 1987,

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<sup>1</sup> Legislative Councillor

relating to whether direct elections should be introduced in 1988. As you may remember, the government devised convoluted questions designed to elicit a particular response. In the end, it concluded that public opinion on the issue was divided, and hence there would be no direct elections in 1988. The secretary general of the Gallup Organisation, who was invited to study the survey results, concluded that the surveys themselves were flawed and that, on the basis of all the information available, direct elections in 1988 were favoured by the public by a margin of two to one or three to one.

The Hong Kong government has a history of resorting to rumour campaigns, not only to stop proposals, such as the setting up of a human rights commission, but to discredit groups and individuals. The *Sunday Morning Post* of 29 March 1987 carried an article with the headline: "Smear campaign probe poses crucial questions." The article was written by Ms Ann Quon, currently the deputy editor of the *South China Morning Post*. It referred to a number of allegations made by Mr John Walden, a retired senior government official, relating to "Smear campaigns" that occurred between 1976 and 1983 instigated by government against targeted individuals and groups.

One such smear campaign related to the British television station, Grenada. Grenada had sent a television team to investigate labour conditions in Hong Kong. According to Mr Walden, a member of the Information Services Department had passed information to the *Star* newspaper, now defunct, suggesting that the Grenada team was financed by the Soviet Union. The *Star* published the story, Grenada sued for libel. The *Star* eventually accepted liability, paid HK\$500,000 in costs and damages and published a full retraction and apology on 23 January 1979.

Another target was the Hong Kong Observers of which both myself and my husband, Frank Ching, are founder members. The views published by the group drew the wrath of the government and it did not take the government very much time to set up a body called the Standing Committee on Pressure Groups to undertake surveillance over the activities of the Observers and other social activists. This secret committee within the government monitored the activities of such

groups as the Society for Community Organisation, the Observers and even the Heritage Society.

The file on the Observers attributed the following motives to the group:

- to oust all expatriate officers and achieve full localisation for Hong Kong; and
- to achieve political independence for Hong Kong.

One of the reports had assessments from Special Branch and the Information Services Department, and concluded that whatever "the real motives are, the HKO does not yet have a solid enough base to be really actually subversive."

At the time, we had no idea that there was a secret committee within the government that was keeping us under surveillance. We only found out because these secret reports were leaked to the British press. To date, they have not been released by the government. For all we know, these reports are still in our personal dossiers, read by civil servants who may still believe their contents. I asked the Governor for permission to have access to dossiers kept on me by the government, but Mr Patten has not yet given me a positive response.

The government also attempted to discredit the group by planting a story that Frank Ching, my husband, had a Soviet connection.

The observers subsequently lodged a complaint with Omelco and asked for an investigation into Mr Walden's allegations of the government applying smear tactics against the Observers and against Frank Ching. Omelco took the case. It conducted its "investigation" without asking for any government files. Its conclusion was a whitewash. It concluded that there was no ground to support the charge that the government had used smear tactics. It went on to say that, "in monitoring the public activities of local interest groups, the Hong Kong Government does not act in any sense improperly."

The Legislative Council was then completely unselected and I guess nobody understood what privacy meant and the chilling effect surveillance of this type has on the individuals concerned. I was also informed recently that the reason the use of smear tactics was not established in the case of Frank Ching was because the

right questions were not asked by the Omelco investigation team. I was informed that evidence was there corroborating the utterance of that smear by a senior government official.

The moral of these stories is simple. When the government feels that public opinion is going the wrong way, it attempts to manipulate and distort it. When the government feels that public opinion is hostile and it feels under siege, it switches into a defensive mode and becomes fully capable of lashing out at its targets. At the best of times the government pays only lip service to the need to protect human rights. At the worst of times, it is the worst violator.

#### **THE NEED FOR A HUMAN RIGHTS COMMISSION**

A human rights commission is needed because the government cannot be depended upon to monitor itself. The government has no incentive to disclose its own omissions or to publicise its own human rights violations. What is needed is a human rights commission that is autonomous and independent of the government.

I was most concerned when the time for government to announce its decision on my proposal to set up a human rights commission neared in late May.<sup>2</sup> The Governor spent the last week in May in London discussing the setting up of a human rights commission amongst other things. He returned to Hong Kong and briefed the Executive Council the next morning. After that, a series of articles appeared in the papers, based on leaks, saying that the government had rejected the proposal for the setting up of a human rights commission for fear of offending China. Publicly, however, the government vehemently denied that it had decided to reject the setting up of a human rights commission.

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<sup>2</sup> [Eds] Ms Wu's proposal was contained in her draft Human Rights and Equal Opportunities Commission Bill 1994, which is reproduced in Appendix 1 hereto. The Governor refused to consent to the introduction of the bill into the Legislative Council. Ms Wu's Equal Opportunities Bill 1994, which did not require the Governor's consent for its introduction, was introduced into the Legislative Council in July 1994.

I cannot help coming to the conclusion that the government had indeed decided against a human rights commission and was making use of leaks to lower public expectations so that, when the announcement is actually made, there will not be a great public outcry. These leaks also serve the purpose of exonerating the government by creating the impression that the decision not to create a human rights commission was made with the best interests of Hong Kong in mind because China is so opposed to the idea.

But human rights must be viewed independently of politics and a government should not be excused from protecting human rights by lowering public demand. It is precisely because of this that the legislative proposal for the setting up of a human rights commission should be put to the legislative council and openly debated.

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR) were extended to Hong Kong by the British government in 1976. These Covenants were important enough to warrant special mention in the Joint Declaration and were regarded as fundamental enough to require preservation beyond 1997. Despite the importance of these Covenants, nothing was done to even promote the awareness of the rights described in them.

In 1988, twelve years after the Covenants came into effect for Hong Kong, at a hearing of the United Nations Human Rights Committee in Geneva, Britain admitted that it had been doing nothing to promote awareness of the rights under the ICCPR in Hong Kong.

The 1988 report presented to the United Nations Human Rights Committee was also more notable for what was left out than for what it actually said.

Six years later, things have not improved much. Both in 1993 and this year, I asked the government to consult the public and hold public hearings before finalising its reports to the Human Rights Committee and to permit legislators to attend the committee hearing with the government team. These requests were refused. I also asked the government for an advance copy of the report to be given

to legislators before it is submitted to the United Nations Human Rights Committee. That request, too, was turned down.

The fact of the matter is that there is no one to perform an audit of the performance of the Hong Kong government and to provide a view as to whether the government has presented a fair and accurate picture of the human rights situation in Hong Kong. The fact of the matter is also that the government does not wish to be obligated to act.

Government officials and Executive Council members have suggested that the best solution is to scatter the functions of the human rights commission over a number of government departments. This, they suggest, would achieve the best likelihood of survival beyond 1997. While I also wish to see human rights legislation survive beyond 1997, I must say that this so-called scattered approach can easily result in human rights becoming lost in the system)

There is nothing more durable than a visible statutory body subject to accountability to both the executive and the legislature.

Distributing the functions across different institutions means that there is no single coordinating body dealing with human rights in a focused manner. Different administrative organs and departments will deal with their own area in a piecemeal fashion and, more likely than not, the right hand will not know what the left hand is doing. The recent fiasco over what gender discrimination laws would cover, with the policy secretary and the governor's spokesman saying contradictory things, is an illustration of the confused approach the government has adopted over this area.

Furthermore the scattered approach will also trade away the other functions of the commission, the ability to set its own agenda, to initiate and to reconcile competing values, the role to protect the vulnerable and the disadvantaged who cannot and do not have the means to protect themselves and the provision of a more congenial, affordable, and cost effective mechanism for resolving disputes.

One of the most significant roles of a human rights commission is to look after the interests of those who are vulnerable and who do not have the skills or the capacity in some cases to protect themselves, such as, the mentally ill and disabled.

The mentally ill are particularly vulnerable when their identities are exposed to the public. A human rights commission is intended to protect groups like them and can recommend and implement measures in a proactive way. In the Hong Kong context, these could include integration of service centres with the community, a massive education program to cultivate a better understanding of the situation and provision of less rigid court procedures when receiving evidence from the mentally disabled.

Recently, we have heard a great deal of criticisms that our system of justice is not accessible or affordable. The complexity of the procedure and the adversarial nature of the proceedings have made it user unfriendly and not conducive to resolving disputes. The litigants are pitted one against the other and hostility increases. The wheels of justice also grind very slowly and justice delayed is justice denied. How cd in Bill of Rights civil cases (excluding immigration cases) were rejected under the 'merit test' of the Legal Aid Department.

Lord Woolf, who is heading the inquiry on access to justice in UK explained that he was reviewing "a very good system of justice --- but no one can afford it, neither the state nor the public."

Costs and the time litigation takes, he added, "are out of control". To create a system for the 21st century, one is forced to the conclusion that one has to make fundamental changes."

Finally, we can not ignore the fact that the complexity of modern living requires resolution and balancing of sometimes competing values. For instance, where does the need for secrecy end and the right of access to information begin?

Hong Kong now has the Bill of Rights. But three years on, we still do not have detailed legislation in place to provide equal opportunities in the private and public sectors. We still do not have the detailed legislal changes."

Finally, we can not ignore the fact that the complexity of modern living requires resolution and balancing of sometimes competing values. For instance, where does the need for secrecy end and the right of access to information begin?

Hong Kong now has the Bill of Rights. But three years on, we still do not



have detailed legislation in place to provide equal opportunities in the private and public sectors. We still do not have the detailed legislation required to effectuate the values enshrined in the Bill of Rights such as access to information and privacy. To date there are still many laws which should be repealed or amended to comply with the Bill of Rights and Hong Kong's treaty obligations.

Recently, we saw a government case relating to presumption of possession of drugs thrown out of court for being in contravention of the Bill of Rights. This only tarnishes the credibility of the law enforcers. What is the point of having provisions on the statute books that the police are afraid of applying because they are unsure that those provisions are still lawful? We should be repealing these and looking for more palatable substitutes. ~~⊗~~

These are the reasons for setting up a human rights commission. ~~⊗~~ We need a body to act on the values enshrined in the Bill of Rights and the Covenants and to implement the obligations. What good is it if we can only talk about our rights and not be able to enjoy them? What good is it if redress for breach eludes us? What good is it if in time of need there is nobody to help us?

You may all remember the government's reluctance to adopt a Bill of Rights for Hong Kong. Both the British and the Hong Kong governments argued that Hong Kong did not need a Bill of Rights. We were told that human rights were already adequately protected by existing laws. Then, because of June 4th, the British and Hong Kong governments decided to adopt a Bill of Rights for Hong Kong. Now they are so proud of this that they point to the Bill of Rights whenever the question of human rights come up. In fact, now they point to the Bill of Rights to argue that there is no need for a human rights commission. The question is whether the government will have the moral courage to set up such a body as a watch dog for the public.

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## **APPENDIX**

### **HUMAN RIGHTS AND EQUAL OPPORTUNITIES**

#### **COMMISSION BILL 1994 <sup>1</sup>**

**Draft**

**Prepared by**

**Hon Anna Wu Hung-yuk, Legislative Councillor**

**May 1994**

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<sup>1</sup> This version of the draft Bill dates from May 1994. This was the Bill which the Governor refused to permit to be introduced into the Legislative Council. This version differs in only minor respects from the draft bill released for public consultation in March 1994. Ms Wu was assisted in the preparation of this draft bill by a team which included Mr Andrew Byrnes, Ms Carole Petersen, Mr Adam Mayes and Mr Eric Chow.



**HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION  
BILL**

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- 106. Ordinance not to affect action to have legislation declared repealed or invalid
- 107. Regulations

### CONSEQUENTIAL AMENDMENTS

#### Equal Opportunities Ordinance

- 108. Amendment of Equal Opportunities Ordinance ( of 1994)
- 109. Sections repealed Commissioner for Administrative Complaints Ordinance
- 110. Departments and Organizations to which this Ordinance applies

### SCHEDULES 1-11<sup>1</sup>

[s. 2]

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<sup>1</sup> The full list of the schedules appears at the end of the Bill. However, the full text of the schedules is not reproduced.

**A BILL**

**To**

Establish a Human Rights and Equal Opportunities Commission and an Equal Opportunities Tribunal, and to provide for effective remedies for violations of human rights and for ancillary and related matters.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

**PART I**

**PRELIMINARY**

**1. Short title and commencement**

(1) This Ordinance may be cited as the Human Rights and Equal Opportunities Commission Ordinance.

(2) This Ordinance shall come into operation on a day to be notified by the Governor by notice in the Gazette and different days may be appointed for different provisions.

**2. Interpretation**

(1) In this Ordinance, unless the context otherwise requires--

"appointed member" ( ) means the Chairperson, the Human Rights Commissioner, the Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Disability Discrimination Commissioner and the Children's Commissioner;

"Chairperson" ( ) means Chairperson of the Commission;

"Children's Commissioner" ( ) means the Children's Commissioner appointed under section 7;

"Commission" ( ) means the Human Rights and Equal Opportunities Commission established under section 6;

"Commissioner" means the Human Rights Commissioner, the Race Discrimination Commissioner, the Sex Discrimination Commissioner,

the Disability Discrimination Commissioner or the Children's Commissioner;

"complainant" ( ) in relation to a complaint, means the person or each of the persons by whom that complaint is lodged;

"complaint" ( ) means--

- (a) a complaint, whether or not a representative complaint, lodged under section 38; and
- (b) a matter referred to the Tribunal for inquiry as a complaint pursuant to section 70(2);

"Conventions" ( ) means the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention concerning Freedom of Association and Protection of the Right to Organize (ILO No 87), and the Convention concerning the Right to Organize and Collective Bargaining Convention (ILO No 98), as set out in Schedules 1 to 8;

"Declarations" ( ) means--

- (a) the Declaration on the Rights of Mentally Retarded Persons proclaimed by the General Assembly of the United Nations on 20 December 1971, as set out in Schedule 9; and
- (b) the Declaration on the Rights of Disabled Persons proclaimed by the General Assembly of the United Nations on 9 December 1975, as set out in Schedule 10; and
- (c) the Declaration on the Elimination of Violence Against Women proclaimed by the General Assembly of the United Nations on 20 December 1993, as set out in Schedule 11;

"Disability Discrimination Commissioner" ( ) means the Disability Discrimination Commissioner appointed under section 7;

"human rights" ( ) means the rights and freedoms recognized in the Conventions, declared by the Declarations or recognised or declared by any relevant international instrument;

"Human Rights Commissioner" ( ) means the Human Rights Commissioner appointed under this Ordinance;

"instrument" ( ) includes a rule, regulation or bylaw;

"international instrument" ( ) includes a declaration made by an international organization;

"judge" ( ) means--

- (a) a judge of a court; or
- (b) a person who has the same designation and status as a judge of a court;

"law" ( ) means a law of Hong Kong and includes Imperial legislation that applies to or in respect of Hong Kong, whether or not it is capable of being amended by an Ordinance;

"member" ( ) means a member of the Commission, and includes the Chairperson;

"proposed enactment" ( ) means--

- (a) a proposed law introduced into the Legislative Council;
- (b) a proposed law prepared on behalf of --
  - (i) the Government;
  - (ii) a body established by law that has the function of recommending proposed laws; or
- (c) an instrument proposed to be made under a law;

"Race Discrimination Commissioner" ( ) means the Race Discrimination Commissioner appointed under section 7;

"relevant international instrument" ( ) means an international instrument in respect of which a declaration under section 106 is in force;

"representative complaint" ( ) means a complaint lodged under section 38 by a person on behalf of the person and other persons or by 2 or more persons on behalf of themselves and other persons, and which is treated by the Tribunal as a representative complaint;

"respondent" ( ), in relation to a complaint, means the person who is, or each of the persons who are, alleged to have done the act to which the complaint relates;

"Sex Discrimination Commissioner" ( ) means the Sex Discrimination Commissioner appointed under section 7;

"Tribunal" ( ) means the Equal Opportunities Tribunal established by Part VII of this Ordinance.

(2) In this Ordinance--

- (a) a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act; and
- (b) a reference, in relation to the doing of an act or the engaging in of a practice, to the person who did the act or engaged in the practice shall, in the case of an act done or practice engaged in by an unincorporated body of persons, be read as a reference to that body.

(3) A reference in this Ordinance to the doing of an act on the ground of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act.

(4) In the definition of "human rights" ( ) in subsection (1)--

- (a) the reference to the rights and freedoms recognised in the Conventions shall be read as a reference to the rights and

- freedoms recognised in the Conventions as they apply to Hong Kong; and
- (b) the reference to the rights and freedoms recognised or declared by any relevant international instrument shall--
- (i) in the case of an instrument (not being a declaration referred to in subparagraph (ii)) that applies to Hong Kong -- be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Hong Kong; or
  - (ii) in the case of an instrument being a declaration made by an international organization that was adopted by Hong Kong -- be read as a reference to the rights and freedoms recognised or declared by the declaration as it was adopted by Hong Kong.

(5) A reference in this Ordinance to the making of a declaration by an international organization shall be read as a reference to the making or adopting of a declaration, proclamation or other statement by such an organization in any way, whether by the passing of a resolution, the issuing of an instrument or otherwise.

(6) A reference in this Ordinance to the adoption by Hong Kong of an international instrument being a declaration made by an international organization shall be read as a reference to the casting by or in respect of Hong Kong of a vote in favour of the making of the declaration by the organization at the meeting of the organization at which the declaration was made or to the giving of some other public notification by Hong Kong expressing its support for the declaration.

(7) A reference in this Ordinance to a person acting on behalf of the Commission is a reference to a person, or each of a body of persons, acting pursuant to a delegation under section 26.

### **3. Ordinance binds the Government**

This Ordinance binds the Government and all public authorities.

### **4. Statutory powers to be exercised in accordance with international obligations**

For the avoidance of doubt, it is hereby declared to be the intention of the legislature that any person exercising a statutory or executive power shall take into account, and act consistently with, obligations imposed under the Conventions, to the extent that those obligations apply to Hong Kong.

### **5. Courts to exercise powers in accordance with international obligations**

For the avoidance of doubt, it is hereby declared to be the intention of the legislature that all courts and tribunals in Hong Kong shall, when exercising any powers vested in them, take into account, and act consistently with, obligations imposed under the Conventions, to the extent that those obligations apply to Hong Kong.

**PART II**

**HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION**

**Establishment and constitution of Commission**

**6. Human Rights and Equal Opportunities Commission**

(1) There is hereby established a Commission to be known as the Human Rights and Equal Opportunities Commission.

(2) The Commission--

- (a) is a body corporate, with perpetual succession;
- (b) shall have a common seal;
- (c) may acquire, hold and dispose of real and personal property; and
- (d) may sue and be sued in its corporate name.

(3) All courts, judges and persons acting judicially shall take judicial notice of the imprint of the common seal of the Commission appearing on a document and shall presume that the document was duly sealed.

**7. Composition**

(1) The Commission shall consist of--

- (a) a Chairperson;
- (b) a Human Rights Commissioner;
- (c) a Race Discrimination Commissioner;
- (d) a Sex Discrimination Commissioner;
- (e) a Disability Discrimination Commissioner; and
- (f) a Children's Commissioner.

(2) The Chairperson and the other Commissioners shall be appointed by the Governor, subject to confirmation by the Legislative Council.

(3) The Chairperson shall be a legally qualified person and shall be appointed as a part-time member.

(4) The Human Rights Commissioner shall be a legally qualified person and shall be appointed as a full-time member.

(5) The Race Discrimination Commissioner, the Sex Discrimination Commissioner, the Disability Discrimination Commissioner and the Children's Commissioner shall be appointed as full-time members.

(6) The affairs of the Commission shall, in accordance with the decisions and subject to the directions of the Commission, be administered by the Human Rights Commissioner.

(7) The functions of the Commission under section 22(1)(d) and the functions of the Commission under section 22(1)(n), to the extent that they relate to the performance of the first-mentioned functions, shall be performed by the Human Rights Commissioner, and a reference in this Ordinance to the Commission or to a member of the Commission shall, in relation to the performance of any of those functions, be read as a reference to the Human Rights Commissioner.

(8) The performance of the functions or the exercise of the powers of the Commission is not affected by reason only of a vacancy in the office of the Chairperson, Human Rights Commissioner, Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, or Children's Commissioner.

(9) In this section, "legally qualified person" means a person who--

- (a) is or has been a judge of a court; or
- (b) is a barrister or solicitor within the meaning of the Legal Practitioners Ordinance (Cap. 159).

#### **8. Appointment of judge as member not to affect tenure, etc.**

(1) The appointment of the holder of a judicial office as a member, or service by the holder of a judicial office as a member, does not affect the person's tenure of that judicial office or the person's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of that judicial office and, for all purposes, the person's service as a member shall be taken to be service as the holder of that judicial office.

(2) In this section, "judicial office" ( ) means--

- (a) an office of judge of a court; or
- (b) an office the holder of which has, by virtue of holding that office, the same status as a judge of a court.

#### **9. Acting Chairperson and Human Rights Commissioner**

(1) If the Human Rights Commissioner is available, the Human Rights Commissioner shall act as Chairperson--

- (a) during a vacancy in the office of Chairperson, whether or not an appointment has previously been made to the office; or
- (b) during any period when the Chairperson is absent from duty or from Hong Kong or is, for any other reason, unable to perform the functions of the office of Chairperson.

(2) The Attorney General may appoint--

- (a) a Commissioner; or
- (b) where a Commissioner is not available to act, any other person,

to act as Chairperson--

- (i) during a vacancy in the office of Chairperson, whether or not an appointment has previously been made to the office; or
- (ii) during any period, or during all periods, when the Chairperson is absent from duty or from Hong Kong or is, for any other reason, unable to perform the functions of the office of Chairperson,

but, a person so appointed must not act as Chairperson during any period while the Human Rights Commissioner is available so to act.

(3) The Attorney General may appoint--

- (a) a Commissioner (other than the Human Rights Commissioner); or
- (b) where a Commissioner is not available to act, any other person,

to act as Human Rights Commissioner--

- (i) during a vacancy in the office of Human Rights Commissioner, whether or not an appointment has previously been made to the office; or
- (ii) during any period, or during all periods, when the Human Rights Commissioner is absent from duty or from Hong Kong, or is, for any other reason, unable to perform the functions of the office of Human Rights Commissioner.

(4) At any time when a person who is not a member of the Commission is acting as Chairperson or Human Rights Commissioner, the person shall be deemed to be a member of the Commission for the purposes of sections 15, 26, 30, 31, 57, 58, 59, 61 and 108.

(5) The validity of anything done by or in relation to a person purporting to act under subsections (2) or (3) shall not be called in question on the ground that--

- (a) the occasion for the person's appointment had not arisen;
- (b) there is a defect or irregularity in connection with the person's appointment;
- (c) the person's appointment had ceased to have effect; or
- (d) the occasion for the person to act had not arisen or had ceased.

## **10. Terms and conditions of appointment**

(1) An appointed member holds office for such period, not exceeding 5 years, as is specified in the instrument of the member's appointment, and is eligible for re-appointment.



(2) An appointed member, other than a member who is a judge, holds office on such terms and conditions (if any) in respect of matters not provided for by this Ordinance as are determined by the Governor.

### **11. Remuneration and allowances**

(1) Subject to this section, an appointed member shall be paid such remuneration as is determined by the Governor.

(2) An appointed member shall be paid such allowances as are prescribed.

(3) If a person who is a judge is appointed as a member, the person is not, while receiving salary or annual allowance as a judge, entitled to remuneration under this Ordinance.

### **12. Leave of absence**

(1) A person appointed as a full-time member has such recreation leave entitlements as are determined by the Governor.

(2) The Attorney General may grant--

- (a) a person appointed as a full-time member leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Attorney General determines; or
- (b) a person appointed as a part-time member leave of absence other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Attorney General determines.

### **13. Resignation**

An appointed member may resign from the office of member by writing signed by the member and delivered to the Governor.

### **14. Termination of appointment**

(1) The Governor may terminate the appointment of a member by reason of misbehaviour or physical or mental incapacity.

(2) If--

- (a) a member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit;
- (b) a full-time member engages, except with the approval of the Attorney General, in paid employment outside the duties of the office of member;

- (c) a full-time member is absent from duty, except on leave granted by the Attorney General in accordance with section 12(2)(a), for 14 consecutive days, or for 28 days in any period of 12 months;
- (d) a part-time member is absent, except on leave granted by the Attorney General in accordance with section 12(2)(b), from 3 consecutive meetings of the Commission; or
- (e) a member fails, without reasonable excuse, to comply with section 15,

the Governor shall terminate the appointment of that member.

(3) In subsections (1) and (2), "member" ( ) means an appointed member but does not include a member who is a judge.

(4) If an appointed member who is a judge ceases to be a judge, the Governor may terminate the appointment of the member.

## **15. Disclosure of interests**

(1) A member who has a direct or indirect pecuniary interest in a matter being considered or about to be considered by the Commission shall, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Commission.

(2) A disclosure under subsection (1) shall be recorded in the minutes of the meeting of the Commission and the member shall not--

- (a) be present during any deliberation of the Commission with respect to that matter; or
- (b) take part in any decision of the Commission with respect to that matter.

## **16. Staff of Commission**

The Commission may from time to time employ persons who shall be paid such remuneration and allowances and shall hold their employment on such other terms and conditions as the Commission shall determine.

## **17. Meetings of the Commission**

(1) The Chairperson may, at any time, convene a meeting of the Commission.

(2) The Chairperson shall convene such meetings of the Commission as, in the Chairperson's opinion, are necessary for the efficient performance of its functions.

(3) At a meeting of the Commission a quorum is constituted by a number of members that is not less than one-half of the number of members for the time being holding office under section 7.

(4) The Chairperson shall preside at all meetings of the Commission at which the Chairperson is present.

- (5) If the Chairperson is not present at a meeting of the Commission--
  - (a) if the Human Rights Commissioner is present, the Human Rights Commissioner shall preside at the meeting; or
  - (b) in any other case, the members present shall elect one of their number to preside at that meeting.
- (6) Questions arising at a meeting of the Commission shall be determined by a majority of the votes of the members present and voting.
- (7) The person presiding at a meeting of the Commission has a deliberative vote, and, in the event of an equality of votes, also has a casting vote.
- (8) The Commission may regulate the conduct of proceedings at its meetings as it thinks fit and shall cause minutes of those proceedings to be kept.

**18. Governor may appoint persons to participate in inquiries**

- (1) The Governor may appoint a person to participate, in accordance with this section, in the performance of the functions of the Commission.
- (2) The Governor may, under subsection (1), appoint such number of members as the Governor considers necessary for the purposes of this section.
- (3) A person who holds an appointment under subsection (1) may, at the request of the Chairperson, participate in the holding of an inquiry under this Ordinance as if the person were a member of the Commission and, for the purposes of the application of the provisions of this Ordinance other than section 17(6), the person shall, in relation to the inquiry, be deemed to be a member of the Commission.
- (4) A person appointed under subsection (1)--
  - (a) holds the appointment for a period, not exceeding 5 years, as is specified in the person's instrument of appointment, but is eligible for reappointment;
  - (b) may resign the appointment by writing signed by the person and delivered to the Governor.
- (5) The Governor may--
  - (a) determine the terms and conditions of appointment, including remuneration, of a person appointed under subsection (1); and
  - (b) may terminate such an appointment at any time.

**19. Annual report**

The Commission shall, as soon as practicable after the end of each financial year, prepare and furnish to the Attorney General a report of its operations during that financial year.

**20. Annual reports to be tabled in Legislative Council**

The Attorney General shall cause a copy of the annual report to be laid on the table of the Legislative Council not later than one month after the report is received by the Attorney General or, where the Legislative Council is not sitting when the Attorney General receives a report, not later than one month after the Legislative Council again commences sitting.

**21. Reports of Commission to be tabled**

(1) The Attorney General shall cause a copy of each report received by the Attorney General under section 34(1) to be laid on the table of the Legislative Council not later than one month after the report is received by the Attorney General or, where the Legislative Council is not sitting when the Attorney General receives a report, not later than one month after the Legislative Council again commences sitting.

(2) The President of the Legislative Council shall cause a copy of each report received under section 34(1) to be laid on the table of the Legislative Council not later than one month after the report is received by the President of the Legislative Council or, where the Legislative Council is not sitting when the President of the Legislative Council receives a report, not later than one month after the Legislative Council again commences sitting.

(3) In this section a reference to a report does not include a confidential supplement to a report referred to in section 34(5).

(4) The Attorney General or the President of the Legislative Council may, if he or she considers it appropriate, lay or cause to be laid on the table of the Legislative Council a confidential supplement to a report.

**PART III**

**FUNCTIONS OF HUMAN RIGHTS AND EQUAL OPPORTUNITIES  
COMMISSION -- GENERAL**

**22. Functions of Commission**

(1) The functions of the Commission are --

- (a) such functions as are conferred on the Commission by any enactment;
- (b) the functions conferred on the Commission by section 34;
- (c) to examine enactments, and (when requested to do so by the Attorney General, the President of the Legislative Council or in writing by 500 persons living in Hong Kong) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Attorney General or to the President of the Legislative Council (where the examination

- has been requested by the Attorney General or the President of the Legislative Council respectively) or to the Attorney General (where the examination has been requested by 500 persons living in Hong Kong) the results of any such examination;
- (d) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and--
    - (i) where the Commission considers it appropriate to do so -- to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
    - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement -- to report to the Attorney General in relation to the inquiry;
  - (e) to promote an understanding and acceptance, and the public discussion, of human rights in Hong Kong;
  - (f) to undertake research and educational programs and other programs for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Government;
  - (g) on its own initiative or when requested by the Attorney General, to report to the Attorney General as to the laws that should be made by the legislature, or action that should be taken by the Government, on matters relating to human rights;
  - (h) on its own initiative or when requested by the Attorney General, to report to the Attorney General as to the action (if any) that, in the opinion of the Commission, needs to be taken by Hong Kong in order to comply with the provisions of the Conventions, of the Declarations or of any relevant international instrument;
  - (i) on its own initiative or when requested by the Attorney General, to examine any relevant international instrument or any other international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Conventions, the Declarations or any other relevant international instrument, and to report to the Attorney General the results of any such examination;
  - (j) on its own initiative or when requested by the Attorney General, to examine any relevant international instrument or any other international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the law and practice of Hong Kong, and to report to the Attorney General the results of any such examination;
  - (k) on its own initiative or when requested by the Attorney General, to examine and provide comments on any report submitted or proposed to be submitted to an international body in respect of the enjoyment of human rights in Hong Kong, and to provide information to such bodies when it considers it appropriate;

- (l) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (d);
  - (m) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues; and
  - (n) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not--
- (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of subsection (1)(c) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
  - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of subsection (1)(d) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

**23. Powers and duties of Commission**

(1) The Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

(2) The Commission may at any time report to the Attorney General on any matter arising in the course of the performance of its functions and shall report to the Attorney General on such a matter if requested by the Attorney General to do so.

**24. Form of examinations or inquiries to be at discretion of Commission, etc.**

(1) For the purpose of the performance of its functions, the Commission may make an examination or hold an inquiry in such manner as it thinks fit and, in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence.

(2) Where the Commission considers that the preservation of the anonymity of a person--

- (a) who has made a complaint to the Commission; or
- (b) who--
  - (i) has furnished or proposes to furnish information;
  - (ii) has produced or proposes to produce a document;
  - (iii) has given or proposes to give evidence; or

- (iv) has made or proposes to make a submission, to the Commission or to a person acting on behalf of the Commission,

is necessary to protect the security of employment, the privacy or any human right of the person, the Commission may give directions prohibiting the disclosure of the identity of the person.

(3) The Commission may direct that---

- (a) any evidence given before the Commission or any information given to the Commission; or
- (b) the contents of any document produced to the Commission,

shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies.

(4) Where the Commission has given a direction under subsection (3) in relation to the publication of any evidence or information or of the contents of a document, the direction does not prevent a person from communicating to another person a matter contained in the evidence, information or document if the first-mentioned person has knowledge of the matter otherwise than by reason of the evidence or information having been given or the document having been produced to the Commission.

(5) In deciding whether or not to give a direction under subsection (3), the Commission shall have regard to the need to prevent such of the following as are relevant to the circumstances--

- (a) prejudice to the security of Hong Kong, or to Hong Kong's relations with other jurisdictions;
- (b) the disclosure of deliberations or advice of the Executive Council;
- (c) the disclosure, or the ascertaining by a person, of the existence or identity of a confidential source of information in relation to the enforcement of the criminal law;
- (d) the endangering of the life or physical safety of any person;
- (e) prejudice to the proper enforcement of the law or the protection of public safety;
- (f) the disclosure of information the disclosure of which is prohibited, absolutely or subject to qualifications, by or under another enactment;
- (g) the unreasonable disclosure of the personal affairs of any person; and
- (h) the unreasonable disclosure of confidential commercial information.

(6) In having regard to the matters mentioned in subsection (5)(a) to (h), the Commission shall try to achieve an appropriate balance between the need to have regard to those matters and the desirability of ensuring that interested persons are sufficiently informed of the results of the Commission's examination or inquiry.

(7) A person who contravenes a direction given by the Commission under subsection (2) or (3) commits an offence and is liable--

- (a) in the case of a natural person, to a fine of \$10,000; or
- (b) in the case of a body corporate, to a fine of \$50,000.

(8) In subsection (1), "function" ( ) does not include a function conferred on the Commission by paragraphs 36(a), (b) or (c).

**25. Commission may engage in consultations**

For the purposes of the performance of its functions, the Commission may work with and consult appropriate persons, governmental organisations and non-governmental organisations.

**26. Delegation**

(1) The Commission, may by writing under its common seal, delegate to a member of the Commission, a member of the staff of the Commission or another person or body of persons all or any of the powers conferred on the Commission under this Ordinance.

(2) A member may, by writing signed by the member, delegate to--

- (a) a member of the Commission; or
- (b) a member of the staff of the Commission; or
- (c) any other person or body of persons, approved by the Commission,

all or any of the powers exercisable by the member under this Ordinance.

(3) Subject to any provision in the instrument of delegation, a person to whom a power of the Commission has been delegated under subsection (1) may, for the purposes of the exercise of that power, exercise any power conferred on a member of the Commission by this Ordinance.

(4) In subsection (1), "power" ( ) does not include a power conferred on the Commission by Part V of this Ordinance.

(5) In this section "member" ( ) means a member of the Commission.

**27. Exercise of function or power in good faith**

(1) The Commission, a member or a person acting on behalf of the Commission is not liable to an action or other proceeding for damages for or in relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred on the Commission.

(2) Where--

- (a) a complaint has been made to the Commission; or
- (b) a submission has been made, a document or information has been furnished, or evidence has been given, to the Commission or to a person acting on behalf of the Commission,

a person is not liable to an action, suit or proceeding in respect of loss, damage or injury of any kind suffered by another person by reason only that the



complaint or submission was made, the document or information was furnished or the evidence was given.

#### PART IV

### FUNCTIONS OF HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION RELATING TO HUMAN RIGHTS

#### 28. Part applies to victimisation offences

In this Part, a reference to an act or practice that is inconsistent with or contrary to any human right includes a reference to an act that is rendered unlawful by section 107.

#### 29. Performance of functions relating to human rights

(1) Subject to subsection (2), the Commission shall perform the functions referred to in section 22(1)(d) when--

- (a) the Commission is requested to do so by the Attorney General;
- (b) a complaint is made in writing to the Commission alleging that an act or practice is inconsistent with or contrary to any human right; or
- (c) it appears to the Commission to be desirable to do so.

(2) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if--

- (a) the Commission is satisfied that the act or practice is not inconsistent with or contrary to any human right;
- (b) the Commission is satisfied that the person aggrieved by the act or practice does not desire that the inquiry be held or continued; or
- (c) in a case where a complaint has been made to the Commission in relation to the act or practice--
  - (i) the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice;
  - (ii) the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance;
  - (iii) where some other remedy has been sought in relation to the subject matter of the complaint -- the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with;
  - (iv) the Commission is of the opinion that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the person aggrieved by the act or practice;
  - (v) where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority -- the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with; or

- (vi) the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority.

(3) The Commission shall, before the expiration of the period of 2 months commencing when a complaint is made to the Commission in respect of an act or practice, decide whether or not to inquire into the act or practice.

(4) Where the Commission decides not to inquire into, or not to continue to inquire into, an act or practice--

- (a) in respect of which a complaint was made to the Commission, the Commission shall forthwith give notice in writing to the complainant of that decision and of the reasons for that decision; or
- (b) in respect of which it appeared desirable to the Commission to inquire, the Commission shall within a reasonable time give notice in writing of that decision to any person whose acts or practices have been the subject of a complaint or subject to inquiry.

(5) Where it appears to the Commission that ---

- (a) a person wishes to make a complaint to the effect that another person has done an act, or engaged in a practice, that is inconsistent with or contrary to any human right; and
- (b) the person requires assistance to formulate the complaint or to reduce it to writing,

it is the duty of the Commission to take reasonable steps to provide appropriate assistance to that person.

(6) A person who is detained in custody ("the detainee") is entitled--

- (a) upon making a request to the person ("the custodian") in whose custody the detainee is detained, or to any other person ("the custodial officer") performing duties in connection with the detention---
  - (i) to be provided with facilities for preparing a complaint in writing under this Part, for giving in writing to the Commission, after the complaint has been made, any other relevant information and for enclosing the complaint or the other information (if any) in a sealed envelope; and
  - (ii) to have sent to the Commission, without undue delay, a sealed envelope delivered by the detainee to the custodian or to a custodial officer and addressed to the Commission; and
- (b) to have delivered to the detainee, without undue delay, any sealed envelope, addressed to the detainee and sent by the Commission, that comes into the possession or under the control of the custodian or of a custodial officer.

(7) Where a sealed envelope addressed to the Commission is delivered by the detainee to the custodian or to a custodial officer for sending to the Commission, or a sealed envelope addressed to the detainee and sent by the Commission comes into the possession or under the control of the custodian or

of a custodial officer, neither the custodian nor any custodial officer is entitled to open the envelope or to inspect any document enclosed in the envelope.

### **30. Power to obtain information and documents**

(1) Where the Commission has reason to believe that a person is capable of furnishing information (in this subsection referred to as "relevant information") or producing documents (in this subsection referred to as "relevant documents") relevant to an inquiry under this Part, the Commission may, by notice in writing served on the person, require the person, at such place, and within such period or on such date and at such time, as are specified in the notice--

- (a) to furnish to the Commission, by writing signed by the person or, in the case of a body corporate, by an officer of the body corporate, such relevant information (if any) as is specified in the notice; and
- (b) to produce to the Commission such relevant documents (if any) as are specified in the notice.

(2) Where documents are produced to the Commission in accordance with a requirement under subsection (1), the Commission--

- (a) may take possession of, and may make copies of, or take extracts from, the documents;
- (b) may retain possession of the documents for such period as is necessary for the purposes of the examination or inquiry to which the documents relate; and
- (c) during that period shall permit a person who would be entitled to inspect any one or more of the documents if they were not in the possession of the Commission to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.

(3) Where the Commission has reason to believe that a person is capable of giving information relevant to a matter under inquiry under this Part, a member may, by notice in writing served on the person, require the person to attend before the member, on such date and at such time and place as are specified in the notice, to answer questions relevant to the matter under inquiry.

(4) In this section, a reference to the Commission includes a reference to a member of the Commission performing the functions of the Commission under this Part.

### **31. Power to examine witnesses**

(1) A member may administer an oath or affirmation to a person required to attend before the member pursuant to section 30(3) and may examine the person on oath or affirmation.

(2) The oath or affirmation to be taken or made by person for the purposes of this section is an oath or affirmation that the evidence the person will give will be true.

**32. Commission to give opportunity for making of submissions**

Where it appears to the Commission as a result of an inquiry into an act or practice that the act or practice is inconsistent with or contrary to any human right, the Commission shall not furnish a report to the Attorney General in relation to the act or practice until it has given a reasonable opportunity to the person who did the act or engaged in the practice, to do, at the option of the person, either or both of the following--

- (a) to appear before the Commission, whether in person or by a representative, and make oral submissions in relation to the act or practice;
- (b) to make written submissions to the Commission in relation to the act or practice.

**33. Nature of settlements**

The Commission shall, in endeavouring to effect a settlement of a matter that gave rise to an inquiry, have regard to the need to ensure that any settlement of the matter reflects a recognition of human rights and the need to protect those rights.

**34. Reports to contain recommendations**

(1) Where, after an examination of an enactment or proposed enactment, the Commission finds that the enactment is, or the proposed enactment would be, inconsistent with or contrary to any human right, the Commission shall include in its report to the Attorney General or the President of the Legislative Council (as the case may be) relating to the results of the examination any recommendations by the Commission for amendment of the enactment or proposed enactment to ensure that the enactment is not, or the proposed enactment would not be, inconsistent with or contrary to any human right.

(2) Where, after an inquiry into an act done or practice engaged in by a person, the Commission finds that the act or practice is inconsistent with or contrary to any human right, the Commission--

- (a) shall serve notice in writing on the person setting out its findings and the reasons for those findings;
- (b) may include in the notice any recommendations by the Commission for preventing a repetition of the act or a continuation of the practice;
- (c) may include in the notice any recommendation by the Commission for either or both of the following--
  - (i) the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice;
  - (ii) the taking of other action to remedy or reduce loss or damage suffered by a person as a result of the act or practice;
- (d) shall include in any report to the Attorney General relating to the results of the inquiry particulars of any

- recommendations that it has made pursuant to paragraph (b) or (c);
  - (e) shall state in that report whether, to the knowledge of the Commission, the person has taken or is taking any action as a result of the findings, and recommendations (if any), of the Commission and, if the person has taken or is taking any such action, the nature of that action; and
  - (f) shall serve a copy of that report on the person and, if a complaint was made to the Commission in relation to the act or practice--
    - (i) where the complaint was made by a person affected by the act or practice-- shall serve a copy of that report on the complainant; or
    - (ii) if the complaint was made by another person -- may serve a copy of that report on the complainant;
  - (g) may publish the results of its inquiry in full or, if the Commission considers it appropriate, in edited form.
- (3) Where--
- (a) a complaint is made to the Commission in relation to an act or practice; and
  - (b) after an inquiry into the act or practice, the Commission finds that--
    - (i) the existence of the act or practice has not been established; or
    - (ii) the act or practice is not inconsistent with or contrary to any human right,

the Commission shall give a copy of a report setting out its findings, and the reasons for those findings, to the complainant and--

- (i) in a case to which paragraph (b)(i) applies -- to the person alleged to have done the act or engaged in the practice; or
- (i) in a case to which paragraph (b)(ii) applies -- to the person who did the act or engaged in the practice.

(4) In setting out findings and reasons in a notice to be served or a report to be given under this section the Commission may exclude any matter if the Commission considers it desirable to do so having regard to any of the matters mentioned in section 24(5) and to the obligations of the Commission under section 24(6).

(5) Where, under subsection (4), the Commission excludes any matter from a report, the Commission shall prepare a confidential supplement setting out the excluded matter and its reasons for excluding the matter and shall furnish the confidential supplement together with its report to the Attorney General or the President of the Legislative Council, as the case may be.

(6) Subject to subsection (7), where the Commission is required or empowered to prepare a report on any matter, the Commission may publish that report, whether or not the report is also required to be submitted to the Attorney General or any other person or body.

(7) Where a report is required to be submitted to the Attorney General or the President of the Legislative Council, the Commission shall not publish the report until after the report has been submitted to the Attorney General or

the President of the Legislative Council, as the case may be.

(8) Where the Commission decides to publish any report, it may publish the report in edited form, if it considers that this is appropriate in the public interest or in the interests of any person who is mentioned in the report.

## **PART V**

### **FUNCTIONS OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION RELATING TO THE HONG KONG BILL OF RIGHTS ORDINANCE AND THE EQUAL OPPORTUNITIES ORDINANCE**

#### **35. Part applies to victimisation**

In this Part, a reference to an act that is unlawful under a provision of the Equal Opportunities Ordinance ( of 1994) includes a reference to an act that is an offence under section 221 of that Ordinance.

#### **36. Additional functions of Commission**

- (1) The following functions are hereby conferred on the Commission--
  - (a) to inquire into alleged infringements of the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Equal Opportunities Ordinance ( of 1994) and to endeavour by conciliation to effect a settlement of the matters to which the alleged infringements relate;
  - (b) to inquire into, and make determinations on, matters referred to it by the Attorney General or a Commissioner;
  - (c) to deal with complaints lodged under section 38;
  - (d) to promote an understanding and acceptance of, and compliance with, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Equal Opportunities Ordinance ( of 1994);
  - (e) to undertake research and educational programs, and other programs for the purpose of promoting the objects of the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Equal Opportunities Ordinance ( of 1994);
  - (f) to examine enactments, and (when requested to do so by the Attorney General, the President of the Legislative Council or in writing by 500 residents of Hong Kong) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to the objects of the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994), and to report to the Attorney General or to the President of the Legislative Council (where the examination has been requested by the Attorney General or the President of the Legislative Council respectively) or to the Attorney General (where the

- examination has been requested by 500 persons living in Hong Kong) the results of any such examination;
- (g) on its own initiative or when requested by the Attorney General, to report to the Attorney General as to the laws that should be made by the Legislature, or action that should be taken by the Government, on matters relating to the rights guaranteed by the International Covenant on Civil and Political Rights as applied to Hong Kong and the Hong Kong Bill of Rights Ordinance (Cap. 383), and on matters relating to discrimination on the grounds of sex, marital status or pregnancy, race, sexuality, disability, age, or other status, or in relation to harassment or vilification on the grounds of sex, sexuality, race or disability;
  - (h) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the ensuring the enjoyment of the rights guaranteed by the Hong Kong Bill of Rights Ordinance (Cap. 383) and the avoidance of discrimination on the grounds of sex, marital status or pregnancy, race, sexuality, disability, age, or other status, or in relation to harassment or vilification on the grounds of sex, sexuality, race or disability;
  - (i) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve issues relating to the interpretation or implementation of the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994) or issues relevant to those Ordinances; and
  - (j) to do anything incidental or conducive to the performance of any of the preceding functions.

### 37. Nature of settlements

The Commission shall, in endeavouring to effect a settlement of a matter that gave rise to an inquiry, have regard to the need to ensure that any settlement of the matter reflects a recognition of the right of every person to equality and to the full enjoyment of the rights contained in the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994), as the case may be.

### 38. Complaints

(1) A complaint in writing alleging that a person has done an act that is unlawful by virtue of a provision of the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994) may be lodged with the Commission by--

- (a) a person aggrieved by the act, on that person's own behalf or on behalf of that person and another person or other persons aggrieved by the act;
- (b) 2 or more persons aggrieved by the act, on their own behalf or on behalf of themselves and another person or other persons aggrieved by the act;

- (c) a person or persons included in a class of persons aggrieved by the act, on behalf of the persons included in that class of persons; or
- (d) a trade union of which a person or persons, or persons included in a class of persons, aggrieved by the act is a member or are members, on behalf of that person, those persons or persons included in that class of persons, as the case may be;
- (e) any group or association which can show that it has a particular interest in the subject matter of the complaint;
- (f) any other person whom the Commission considers in the circumstances of the case has sufficient interest to lodge a complaint.

(2) In this section, "trade union" ( ) means a body --

- (a) an organization of employees that is registered under the Trade Unions Ordinance (Cap 332); or
- (b) any other similar body.

**39. Reference of matter to the Commission by the Attorney General**

The Attorney General may refer any matter to the Commission for inquiry as a complaint under this Ordinance.

**40. Commissioner deemed to be a complainant**

Where--

- (a) a Commissioner has referred to the Commission a matter that came before the Commissioner otherwise than as the result of the making of a complaint to the Commissioner; or
- (b) the Attorney General has referred a matter to the Commission under section 39,

then, for the purposes of any inquiry into the matter by the Commission, this Ordinance has effect as if--

- (i) the matter had been the subject of a complaint;
- (ii) a reference to the respondent were a reference to the person who is, or each of the persons who are, alleged to have done the act to which the matter relates.

**41. Inquiries by Commissioners**

(1) Where--

- (a) a complaint relating to an alleged unlawful act is made to the Commission under section 38; or
- (b) it appears to the Commission that a person has done an act that is unlawful by virtue of a provision of the Hong Kong



Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994),

the Commission shall notify the Human Rights Commissioner accordingly and the Human Rights Commissioner shall refer the complaint for investigation--

- (i) where the complaint alleges discrimination on the basis of sex, marital status or pregnancy, to the Sex Discrimination Commissioner;
- (ii) where the complaint alleges discrimination on the ground of race, to the Race Discrimination Commissioner;
- (iii) where the complaint alleges discrimination on the ground of disability, to the Disability Discrimination Commissioner.

(2) The Human Rights Commissioner shall have responsibility for investigating other complaints submitted pursuant to section 38, but may refer such complaints to one of the other Commissioners for investigation.

(3) Notwithstanding subsection (2), the Human Rights Commissioner may refer a complaint to a Commissioner other than the Commissioner primarily responsible for complaints of that sort, where the Human Rights Commissioner considers that such a step is appropriate.

(4) A Commissioner responsible for the investigation of a complaint may, for the purposes of this Part, obtain information from such persons, and make such inquiries, as the Commissioner thinks fit.

#### **42. Where complaint can be processed under Part IV and Part V**

Where the Commission receives a complaint that may be dealt with either under Part IV or under this Part, the complaint shall be dealt with under this Part.

#### **43. Commission may decline to inquire into complaint, etc.**

(1) Where the Human Rights Commissioner has referred a complaint to another Commissioner ("the responsible Commissioner") pursuant to section 41, the responsible Commissioner shall, subject to subsection (2), inquire into the act and endeavour, by conciliation, to effect a settlement of the matter to which the act relates.

(2) The responsible Commissioner may decide not to inquire into an act, or, if the responsible Commissioner has commenced to inquire into an act, decide not to continue to inquire into the act, if--

- (a) the responsible Commissioner is satisfied that the act is not unlawful under the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994);
- (b) the responsible Commissioner is of the opinion that the person aggrieved by the act does not desire, or none of the persons aggrieved by the act desires, that the inquiry be made or continued;

- (c) in a case where a complaint has been made to the Commission in relation to the act, a period of more than 12 months has elapsed since the act was done; or
- (d) in a case where a complaint has been made to the Commission in relation to the act, the responsible Commissioner is of the opinion that the complaint was frivolous, vexatious, misconceived or lacking in substance.

(3) Where the responsible Commissioner decides not to inquire into, or not to continue to inquire into, an act in respect of which a complaint was made to the Commission, that Commissioner shall give notice in writing to the complainant or each of the complainants of that decision, of the reasons for that decision and of the rights of the complainant or each of the complainants under subsection (5).

(4) Subsection (3) does not apply in relation to a decision of a Commissioner that is made at the request of the complainant or all the complainants, as the case requires.

(5) Where a Commissioner has given a complainant a notice under subsection (3) relating to a decision, the complainant may, within 21 days after receipt of the notice, by notice in writing served on the Commissioner--

- (a) if subsection (2)(a) applies--require the Commissioner to refer the complaint to the Tribunal; or
- (b) in any other case -- require the Commissioner to refer the decision to the Chairperson.

(6) On receipt of a notice under subsection (5)(a), the Commissioner concerned shall refer the complaint to the Tribunal together with a report relating to any inquiries made by the Commissioner into the complaint.

(7) If a Commissioner receives a notice under subsection (5)(b), the Commissioner must refer the decision to the Chairperson together with a report about the decision.

(8) A report for the purposes of subsection (5) must not set out or describe anything said or done in the course of conciliation proceedings under this Part (including anything said or done at a conference held under this Part).

#### **44. Chairperson may review a decision of a Commissioner not to hold an inquiry or to discontinue an inquiry**

(1) This decision applies if a decision of a Commissioner not to inquire into an act, or not to continue to inquire into an act, is referred to the Chairperson under section 43(5)(b).

(2) The Chairperson--

- (a) must review the Commissioner's decision; and
- (b) must decide either--
  - (i) to confirm the Commissioner's decision; or
  - (ii) to set aside the Commissioner's decision and to direct the Commissioner to inquire into the act, or to

continue to inquire into the act, in accordance with section 41.

(3) Notwithstanding subsection (2), the Chairperson may refuse to review the Commissioner's decision unless the complainant gives the Chairperson such relevant information as the Chairperson requires.

(4) The Chairperson must give written notice of a decision of the Chairperson under subsection (2)(b) to the complainant and to the Commissioner.

(5) The notice must set out the reasons for the decision.

(6) Notwithstanding section 43(2), the Commissioner must comply with a direction of the Chairperson under subsection (2)(b)(ii) unless the complainant notifies, or all the complainants notify, the Commissioner that the complainant does not wish, or the complainants do not wish, the inquiry to be held or continued.

#### **45. Review by Chairperson -- Interim determination**

(1) This section applies if a decision of a Commissioner not to inquire into an act, or not to continue to inquire into an act, is referred to the Chairperson under section 43(5)(b).

(2) If the Chairperson has not completed a review of the Commissioner's decision, the Commission or the Chairperson may make an interim determination of such a nature as would, if it were binding and conclusive upon the parties, preserve--

- (a) the status quo between the parties to the complaint; or
- (b) the rights of the parties to the complaint,

pending completion of the matter the subject of the complaint.

(3) The Commission or the Chairperson may vary or revoke an interim determination made under this section.

(4) The functions conferred on the Commission by subsection (2) or (3) may only be performed on an application made by the Chairperson.

(5) The functions conferred on the Chairperson by subsection (2) or (3) may only be performed--

- (a) on the Chairperson's own initiative; and
- (b) if the Chairperson thinks that it is expedient that the Chairperson should perform those functions.

(6) An interim determination under this section is not binding or conclusive between any of the parties to the determination.

#### **46. Power to obtain information and documents**

(1) Where a Commissioner has reason to believe that a person is capable of furnishing information (in this subsection referred to as "relevant

information") or producing documents (in this subsection referred to as "relevant documents") relevant to an inquiry under this Part, the Commissioner may, by notice in writing served on the person, require the person, at such place, and within such period or on such date and at such time, as are specified in the notice--

- (a) to furnish to the Commissioner, by writing signed by the person or, in the case of a body corporate, by an officer of the body corporate, such relevant information (if any) as is specified in the notice; and
- (b) to produce to the Commissioner such relevant documents (if any) as are specified in the notice.

(2) Where documents are produced to a Commissioner in accordance with a requirement under subsection (1), the Commissioner--

- (a) may take possession of, and may make copies of, or take extracts from the documents;
- (b) may retain possession of the documents for such period as is necessary for the purposes of the inquiry to which the documents relate; and
- (c) during that period shall permit a person who would be entitled to inspect any one or more of the documents if they were not in the possession of the Commissioner to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.

#### **47. Directions to persons to attend compulsory conference**

(1) For the purpose of inquiring into an act, and endeavouring to settle the matter to which the act relates, in accordance with section 41, a Commissioner may, by notice in writing, direct the persons referred to in subsection (2) to attend, at a time and place specified in the notice, a conference presided over by the Commissioner or a person appointed by the Commissioner.

(2) Directions under subsection (1) to attend a conference in relation to an act shall be given to--

- (a) where a complaint was made to the Commission in relation to that act--the complainant, or all the complainants, as the case requires;
- (b) the person who is alleged to have done the act; and
- (c) any other person who, in the opinion of the Commissioner, is likely to be able to provide information relevant to the inquiry or whose presence at the conference is, in the opinion of the Commissioner, likely to be conducive to the settlement of the matter to which the act relates.

(3) A person who has been given a direction under subsection (1) to attend a conference is entitled to be paid by the Commission a reasonable sum for the person's attendance at the conference.

(4) A Commissioner may, in a notice given to a person under subsection (1), require the person to produce such documents at the conference as are specified in the notice.

#### **48. Compulsory conference**

(1) The person presiding at a conference held under this Part may require a person attending the conference to produce a document.

(2) A conference under this Part shall be held in private and, subject to this Ordinance, shall be conducted in such manner as the person presiding at the conference thinks fit.

(3) Subject to subsection (4), a body of persons, whether corporate or unincorporated, that is directed under section 47 to attend a conference shall be deemed to attend if an officer or employee of that body attends on behalf of that body.

(4) Except with the consent of the person presiding at a conference under this Part--

- (a) a natural person is not entitled to be represented at the conference by another person; and
- (b) a body of persons, whether corporate or unincorporated, is not entitled to be represented at the conference by a person other than an officer or employee of that body.

#### **49. Reference of matter to the Tribunal**

(1) Where a Commissioner--

- (a) is of the opinion that a matter cannot be settled by conciliation;
- (b) has endeavoured to settle a matter by conciliation but has not been successful; or
- (c) is of the opinion that the nature of a matter is such that it should be referred to the Tribunal,

the Commissioner shall refer the matter to the Tribunal together with a report relating to any inquiries made by the Commissioner into the matter.

(2) A report for the purposes of subsection (1) shall not set out or describe anything said or done in the course of conciliation proceedings under this Part (including anything said or done at a conference held under this Part).

(3) Evidence of anything said or done in the course of conciliation proceedings under this Part (including anything said or done at a conference held under this Part) is not admissible in subsequent proceedings under this Ordinance relating to the matter.

#### **50. Assistance to complainants before Tribunal**

(1) When a complaint is referred to the Tribunal under section 49, the Commission--

- (a) shall, if the complainant requests the Commission to do so, either personally or by counsel or representative assist the complainant in the presentation of the case of the complainant to the Tribunal; and
- (b) may, if the complainant requests the Commission to do so and the Commission considers it appropriate in all the circumstances (including the financial circumstances of the complainant) to do so, make such contribution towards the cost of witness and other expenses as is necessary to enable the complainant to call or give, or to call and give, evidence before the Tribunal.

(2) The Commission may, in making a contribution under subsection (1)(b), make the contribution subject to such conditions as the Commission thinks fit.

(3) If a condition to which the making of a contribution is subjected under subsection (2) requires the complainant to repay to the Commission in circumstances specified in that condition the whole or any part of the contribution made under subsection (2) and those circumstances arise, the Commission may recover that whole or part from the complainant by action in a court of competent jurisdiction as a debt due to the Commission.

(4) Evidence of anything said or done in the course of conciliation proceedings under section 48 shall not be admissible in subsequent proceedings before the Tribunal.

(5) For the purposes of subsection (1), a request made to a Commissioner shall be considered to be a request made to the Commission.

#### **51. Commission may assist complainants on appeal to Court of Appeal**

(1) The Commission may, on the application of a complainant who has received assistance under section 50 and if the Commission considers it appropriate in all the circumstances (including the financial circumstances of the complainant) to do so--

- (a) arrange for the provision of legal representation; or
- (b) grant such financial assistance as is necessary to enable the complainant to call or give, or to call and give, evidence,

before the Court of Appeal, or both, to enable the complainant to make or defend an appeal to the Court of Appeal under section 100.

(2) The Commissioner may, in granting an application under subsection (1), make that grant subject to such conditions as the Commissioner thinks fit.

(3) If a condition to which the grant of an application is subjected under subsection (2) requires the complainant to pay to the Commissioner in circumstances specified in that condition the whole or any part of any expense incurred by the Commissioner in the exercise of a power referred to in subsection (1)(a) or (b) and those circumstances arise, the Commissioner may

recover that whole or part from the complainant by action in a court of competent jurisdiction as a debt due to the Commissioner.

**52. Power of the Commission to commence proceedings**

(1) Where it appears to the Commission that a relevant person may have done an act which is unlawful under the Equal Opportunities Ordinance ( of 1994) or the Hong Kong Bill of Rights Ordinance (Cap. 383), the Commission may commence proceedings against that person before the Equal Opportunities Tribunal or before another court of competent jurisdiction.

(2) Where it appears to the Commission that a legislative provision or rule of the common law:

(Cap. 383) or with article VII(3) of the Hong Kong Letters Patent 1917 to 1992 (App. I, p.C1);

- (b) has been repealed in part or in whole by the provisions of the Equal Opportunities Ordinance ( of 1994); or
- (c) requires a person to do any act which is unlawful under the Equal Opportunities Ordinance ( of 1994),

the Commission may commence proceedings before the Equal Opportunities Tribunal or before another court of competent jurisdiction in respect of that provision or rule.

(3) For the purposes of this section, a reference to a relevant person means the Government, a public authority or a person exercising a power conferred by or pursuant to statute, or exercising a prerogative power or a power derived from a prerogative power.

(4) The power conferred on the Commission by this section does not affect any right of the Commission or other person to commence proceedings based on the Equal Opportunities Ordinance ( of 1994), the Hong Kong Bill of Rights Ordinance (Cap. 383), or on any other basis.

**53. Powers of court in relation to proceedings brought under section 52**

(1) In proceedings brought under section 52, the Tribunal or a court may make any order which it considers just and appropriate in the circumstances.

(2) Without limiting the generality of the power granted by subsection (1), the Tribunal or a court may exercise any of the powers referred to in subsection 93(2), as appropriate in the circumstances.

**54. Commission may grant exemptions**

(1) The Commission may, on application by--

- (a) a person, on that person's own behalf or on behalf of that person and another person or other persons;

- (b) 2 or more persons, on their own behalf or on behalf of themselves and another person or other persons; or
- (c) a person or persons included in a class of persons on behalf of the persons included in that class of persons,

by instrument in writing, grant to the person, persons or class of persons, as the case may be, an exemption from the operation of a provision of the Equal Opportunities Ordinance ( of 1994), as specified in the instrument, for a period not exceeding 5 years.

(2) The Commission may, on application by a person to, or in respect of, whom an exemption from a provision of the Equal Opportunities Ordinance ( of 1994) has been granted under subsection (1), being an application made before the expiration of the period for which that exemption was granted, grant a further exemption from the operation of that provision.

(3) An exemption, or further exemption, from the operation of a provision of the Equal Opportunities Ordinance ( of 1994)--

- (a) may be granted subject to such terms and conditions as are specified in the instrument;
- (b) may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument; and
- (c) shall be granted for a specified period not exceeding 5 years.

(4) In considering an application for an exemption or a further exemption from the operation of a provision of the Equal Opportunities Ordinance ( of 1994), the Commission may make an examination or hold an inquiry in such manner as it thinks fit and, in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence.

(5) Before determining whether to grant an application for an exemption, a further exemption or the variation of an exemption from the operation of a provision of the Equal Opportunities Ordinance ( of 1994) has been made, the Commission shall by notice in the Gazette or a newspaper, cause notice of the application to be given, in such form and manner as the Commission directs, and shall invite submissions from members of the public in relation to that application.

## **55. Notice of decisions to be published**

(1) The Commission shall, not later than 1 month after it makes a decision under section 54, cause to be published in the Gazette a notice of the making of the decision--

- (a) setting out its findings on material questions of fact;
- (b) referring to the evidence on which those findings are based; and
- (c) giving the reasons for the making of the decision.

(2) The Commission shall, not later than 1 month after it makes a decision under section 54, cause notice in writing of the Commission's decision to be served on the party who applied for the exemption and every person who made a submission to the Commission in relation to that application.



(3) Any failure to comply with the requirements of subsection (1) or (2) in relation to a decision does not affect the validity of the decision.

#### **56. Effect of exemption orders**

Nothing in the Equal Opportunities Ordinance ( of 1994) renders it unlawful for a person who has been granted an exemption from a provision of that Ordinance, or a person in the employment or under the direction or control of a person who has been granted such an exemption, to do an act in accordance with the provisions of the order by which the exemption was granted.

#### **57. Appeal against refusal of exemption**

(1) A person whose application for an exemption or for a further exemption has been refused by the Commission may appeal to the Tribunal against that decision within 30 days of receipt by that person of notice of the Commission's decision pursuant to section 55(2).

(2) A person who--

- (a) has made a submission to the Commission under section 54(5); and
- (a) is aggrieved by the decision of the Commission to grant an exemption under section 54,

may appeal to the Tribunal against that decision within 30 days of the publication of notice of the decision in the Gazette.

(3) An appeal against a refusal of an exemption or further exemption shall be a de novo hearing before the Tribunal.

(4) The Tribunal may--

- (a) grant an exemption or further exemption subject to such terms and conditions as are specified in the order;
- (b) vary an exemption or further exemption; or
- (c) refuse to grant an exemption or further exemption or to vary an exemption.

(5) Where the Tribunal grants an exemption or further exemption, the exemption shall be for the period specified in the order, but shall in no case be for a period of more than 5 years.

(6) The Commission and the Attorney General shall have the right to intervene in any appeal made under this section.

(7) Notwithstanding subsection (2), the Tribunal may, subject to such conditions as the Tribunal may impose, permit a person to intervene as a party in the hearing of any appeal under this section if it considers that the person has a sufficient interest in the subject matter of the appeal, or if it considers that it is otherwise in the public interest that it should permit the person to intervene.

(8) The Tribunal shall, not later than 1 month after it makes a decision under this section, cause to be published in the Gazette a notice of the making of the decision--

- (a) setting out its findings on material questions of fact;
- (b) referring to the evidence on which those findings are based; and
- (c) giving the reasons for the making of the decision.

(9) The Tribunal shall, not later than 1 month after it makes a decision under this section, cause notice in writing of the Commission's decision to be served on the party who applied for the exemption and on every person who appeared as a party or in any other capacity at the proceedings before the Tribunal under this section.

## PART VI

### OFFENCES RELATING TO THE FUNCTIONS OF THE COMMISSION

#### 58. Failure to comply with requirement

(1) A person who refuses or fails, without reasonable excuse--

- (a) to be sworn or make an affirmation; or
- (b) to give information or produce a document,

when so required under this Ordinance, commits an offence and is liable--

- (i) in the case of a natural person, to a fine of \$10,000; or
- (ii) in the case of a body corporate, to a fine of \$50,000.

(2) A person who--

- (a) after having been served with a notice under section 30 (3), without reasonable excuse--

- (i) refuses or fails to comply with the notice; or
- (ii) when attending before a member in compliance with the notice, refuses or fails to answer a question that is required by the member to be answered; or

- (b) after having been served with a notice under section 47(1), without reasonable excuse refuses or fails to comply with the notice,

commits an offence and is liable--

- (i) in the case of a natural person, to a fine of \$10,000; or
- (ii) in the case of a body corporate, to a fine of \$50,000.

(3) Without limiting the generality of the expression "reasonable excuse" ( ) in this section, it is a reasonable excuse for a person to refuse or fail to furnish information, produce a document or answer a question when required to do so under this Ordinance, that the information, the production of the document or the answer to a question might tend to incriminate that person.

### **59. Disclosure of information or contents of documents**

(1) Where the Attorney General furnishes to the Commission a certificate certifying that the giving to the Commission, or to a person acting on behalf of the Commission, of information concerning a specified matter (including the giving of information in answer to a question) or the production to the Commission, or to a person acting on behalf of the Commission, of a specified document would be contrary to the public interest--

- (a) by reason that it would prejudice the security, defence or international relations of Hong Kong;
- (b) by reason that it would involve the disclosure of communications between the Government of Hong Kong and the national or provincial Government of another country or jurisdiction, being a disclosure that would seriously prejudice relations between those Governments;
- (c) by reason that it would involve the disclosure of deliberations or advice of the Executive Council;
- (d) by reason that it would prejudice the conduct of an investigation or inquiry into crime or criminal activity that is currently being pursued or would prejudice the fair trial of any person;
- (e) by reason that it would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement of the criminal law;
- (f) by reason that it would prejudice the effectiveness of the operational methods or investigative practices or techniques of agencies responsible for the enforcement of the criminal law; or
- (g) by reason that it would endanger the life or physical safety of any person,

neither the Commission nor any other person is entitled to require a person to give any information concerning the matter or to produce the document.

(2) Notwithstanding the provisions of any law, a person is not excused--

- (a) from giving any information, or producing a document, when required to do so pursuant to this Ordinance; or
- (b) from answering a question that the person is required to answer by a member before whom the person is attending in compliance with a notice served on the person under section 30(3),

on the ground that the giving of the information, the production of the document or the answering of the question--

- (i) would disclose legal advice furnished to a Government official, to a person or body that acts on behalf of the Government, or to a public authority;
- (ii) would contravene the provisions of any other Ordinance or would be contrary to the public interest; or
- (e) might make the person liable to a penalty.

(3) A person is not liable to any penalty under the provisions of any other law by reason of--

- (a) giving information or producing a document when required to do so pursuant to this Ordinance; or
- (b) answering a question that the person is required to answer by a member before whom the person is attending in compliance with a notice served on the person under section 30(3).

#### **60. False or misleading information**

A person who gives information or makes a statement to the Commission, or to a person acting on behalf of the Commission, knowing that the information or statement is false or misleading in a material particular, commits an offence and is liable--

- (a) in the case of a natural person, to a fine or \$10,000 or imprisonment for 3 months, or both; or
- (b) in the case of a body corporate, to a fine of \$50,000.

#### **61. Offences relating to administration of Ordinance**

(1) A person who hinders, obstructs, molests or interferes with--

- (a) a member participating in an inquiry or examination under this Ordinance; or
- (b) a person acting on behalf of the Commission, while that person is holding an inquiry or carrying out an investigation under this Ordinance,

commits an offence and is liable--

- (i) in the case of a natural person, to a fine of \$10,000; or
- (ii) in the case of a body corporate, to a fine of \$50,000.

### **PART VII**

### **THE EQUAL OPPORTUNITIES TRIBUNAL**

#### **Establishment of Tribunal**

**62. The Tribunal**

(1) There shall be a Tribunal to be known as the Equal Opportunities Tribunal which shall be a court of record.

(2) Subject to section 65, the Tribunal shall consist of a President, presiding officers and such other members as may be appointed under section (5).

(3) The President shall be appointed by the Governor, and shall be a legal practitioner of not less than 7 years' standing.

(4) Every District Judge and deputy District Judge shall by virtue of his office be a presiding officer.

(5) The other members shall be such other persons, not less than 2 in number, appointed by the Governor as are qualified in law or, in the opinion of the Governor, sufficiently experienced in the field of human rights or other fields relevant to the proceedings of the tribunal to qualify them to sit as members.

(6) The Governor may also appoint a legally qualified member of the Tribunal who is not a judge as a presiding officer.

**63. Term of office of members**

Subject to this Part, a member holds office for such term not exceeding 5 years as is specified in the member's instrument of appointment and is eligible for reappointment.

**64. Remuneration**

A member is entitled to such remuneration, including travelling and subsistence allowances, as is determined from time to time by the Governor.

**65. Vacation of office**

The office of a member of the Tribunal shall become vacant if--

- (a) the member dies;
- (b) the member's term of office expires;
- (c) the member resigns that office by notice in writing delivered to the Governor;
- (d) the member is nominated for election as a member of the Legislative Council, the Urban Council, the Regional Council or a District Board; or
- (e) the member is removed from office pursuant to section 66.

**66. Removal from office**

(1) The Governor may remove a non-judicial member of the Tribunal from office--

- (a) if the member is permanently incapable of performing the member's duties; or
- (b) for misconduct in the performance of duties.

(2) The Governor shall notify the removal of a non-judicial member to the President of the Legislative Council and the removal shall take effect--

- (a) where the Legislative Council is sitting at the time the President of the Legislative Council is so notified, 30 days after the President of the Legislative Council has been notified, unless the Legislative Council votes by a majority to reverse the decision to remove the member; or
- (b) where the Legislative Council is not sitting the President of the Legislative Council is so notified, 30 days after the Legislative Council again commences sitting.

(3) A judicial member of the Tribunal may be removed from office as a member of the Tribunal only for incapacity or misconduct and only in accordance with the procedures provided for by law for the removal of a judge of the District Court.

#### **67. Acting President**

(1) The Chief Justice may at any time appoint a presiding officer of the Tribunal to act as President during the absence or illness of the President or when the President is otherwise unavailable to perform the functions of President.

(2) A person appointed under section (1) shall have and may exercise, while acting as President, the functions of the President.

#### **68. Registrar of the Tribunal**

(1) There shall be attached to the Tribunal a registrar and such number of deputy registrars and other officers as the Governor may consider necessary.

#### **69. Validity of acts of Tribunal**

An act or proceeding of the Tribunal shall not be invalid by reason of a defect in the appointment of a member or a vacancy in its membership.

### **Functions of the Tribunal**

#### **70. Jurisdiction of the Tribunal**

(1) The Tribunal shall carry out the functions conferred and imposed on the Tribunal in this Part in accordance with the provisions of this Part.

(2) The Attorney General may refer any matter to the Tribunal for inquiry as a complaint under this Part.

(3) Subject to section (4), the Tribunal shall hold an inquiry into each complaint or matter referred to it under subsection (2), section 43(6), or section 49(1).

(4) The Tribunal shall not hold, or shall discontinue, as the case requires, an inquiry into--

- (a) a complaint referred to it under section 43(6) or 49(1) if the complainant notifies the Tribunal that the complainant;
- (b) a matter referred to it under subsection (2) if the Attorney General notifies the Tribunal that the Attorney General,

does not wish that inquiry to be held or to continue.

### **71. Exercise of the Tribunal's jurisdiction**

(1) Subject to subsection (2), the Tribunal may be constituted--

- (a) by the President and 2 members; or
- (b) where the President so directs, by a presiding officer and 2 members.

(2) The President may give directions as to the arrangement of the business of the Tribunal and as to the deputy president and the deputy members who are to constitute the Tribunal for the purposes of particular proceedings.

(3) Where the President gives a direction as to the persons who are to constitute the Tribunal for the purposes of a particular proceeding the President may at any time after the giving of the direction and before the commencement of the hearing of the proceeding revoke the direction and give a further direction under subsection (2).

(4) Where the President gives a direction that the Tribunal be constituted for the purposes of particular proceedings by a deputy president and 2 deputy members, the deputy president shall have and may exercise in respect of those proceedings the powers, duties, and functions of the President.

(5) The Tribunal as constituted under subsection (1)(b) may sit simultaneously with the Tribunal as constituted under subsection (1)(a).

### **72. Procedure applicable to Tribunal**

(1) Except as provided by this Ordinance, the Equal Opportunities Ordinance ( of 1994), by regulation or by rules made under this Ordinance, the procedure applicable to hearings before the Tribunal shall be the procedure which applies to proceedings before the District Court.

(2) The President of the Tribunal may make rules governing the conduct of the proceedings of the Tribunal under this Ordinance.

### **73. Decisions of the Tribunal**

(1) The President, or a presiding officer where the President is not sitting, shall preside at any meeting of the Tribunal.

(2) Subject to subsection (3), a decision in which any 2 members of the Tribunal concur shall be a decision of the Tribunal.

(3) The President, or presiding officer where the President is not sitting, shall determine any question relating to the admissibility of evidence, and any other question of law or procedure, and may do so in the absence of the other members of the Tribunal.

#### **74. A single inquiry into several complaints**

Where the Tribunal is of the opinion that 2 or more complaints arise out of the same or substantially the same circumstances or subject-matter, it may hold a single inquiry in relation to those complaints.

#### **75. Joinder of parties by Tribunal**

Where, before the holding of an inquiry, or at any stage during the holding of an inquiry, the Tribunal is of the opinion that a person ought to be joined as a party to the inquiry, the Tribunal may, by notice in writing given to that person, join that person as a party to the inquiry.

#### **76. Notice of inquiry and rights of parties at inquiry**

(1) The Tribunal--

- (a) shall give a party to an inquiry, other than a person to whom the Tribunal grants leave to appear as a party to the inquiry, such notice in such manner as the Tribunal determines of the time and place at which it intends to hold the inquiry; and
- (b) shall give each party to an inquiry reasonable opportunity to call or give evidence, examine or cross-examine witnesses and make submissions to the Tribunal.

(2) If a party to an inquiry to whom notice has been given under subsection (1)(a) fails to attend at the time and place specified for the inquiry, the Tribunal may hold the inquiry in the absence of that party.

#### **77. Parties to inquiry**

The parties to an inquiry shall be the complainant, the respondent, any person joined by the Tribunal as a party to the inquiry and any person to whom the Tribunal grants leave to appear as a party to the inquiry.

#### **78. Appearance and representation before Tribunal**

(1) A party to an inquiry--

- (a) is entitled to appear personally or where the party is a body corporate, by a director, the secretary or an agent of the body corporate; and
- (b) may, by the leave of the Tribunal, be represented by the party's solicitor or counsel or an agent.



(2) No person, other than a legal practitioner, is entitled to demand or receive any fee or reward for representing a party to an inquiry.

#### **79. Officer assisting the Tribunal**

(1) The Tribunal may make arrangements with the Commission for an officer of the Commissioner to appear at an inquiry to assist the Tribunal, or may appoint any other person to act as counsel to the Commission.

(2) An officer of the Commission or other person assisting the Tribunal at an inquiry in accordance with arrangements made under subsection (1) shall, in relation to that inquiry, be subject to the control and direction of the Tribunal.

#### **80. Determination of representative complaints**

At any inquiry held in respect of a representative complaint, the Tribunal shall determine, as a preliminary matter, whether that complaint shall be dealt with as a representative complaint.

#### **81. Matters to be considered in determination of representative complaints**

(1) The Tribunal shall not permit a complaint to be dealt with as a representative complaint unless it is satisfied that the complaint is made bona fide and in good faith as a representative complaint.

(2) In considering whether a complaint is made bona fide and in good faith as a representative complaint, the Tribunal shall satisfy itself--

- (a) that--
  - (i) the complainant is a member of a class of persons, the members of which class have been affected, or may reasonably be likely to be affected, by the conduct of the respondent;
  - (ii) the complainant has in fact been affected by the conduct of the respondent;
  - (iii) the class is so numerous that joinder of all its members is impracticable;
  - (iv) there are questions of law or fact common to all members of the class;
  - (v) the claims of the complainant are typical of the claims of the class;
  - (vi) multiple complaints would be likely to produce varying determinations which could have incompatible or inconsistent results for the individual members of the class; and
  - (vii) the respondent has acted on grounds apparently applying to the class as a whole; or
- (b) that notwithstanding that the requirements of paragraph (a) have not been satisfied, the justice of the case demands that the matter be dealt with and a remedy provided by means of a representative complaint.

**82. Amendment of complaint by Tribunal**

Where the Tribunal is satisfied--

- (a) that the complaint could be dealt with as a representative complaint if the class of persons on whose behalf that complaint is lodged is increased, reduced or otherwise altered, the Tribunal may amend the complaint so that the complaint can be dealt with as a representative complaint; or
- (b) that the complaint has been wrongly made as a representative complaint, the Tribunal may amend the complaint by removing the names of the persons or the class of persons on whose behalf that complaint was lodged so that the complaint can be dealt with as a complaint other than a representative complaint.

**83. Ordinary complaint not precluded by representative complaint**

Nothing in this Ordinance shall prevent a person from lodging a complaint, other than a representative complaint, under section 38, notwithstanding that the conduct in respect of which the complaint is lodged has also been the conduct in respect of which a representative complaint has been lodged.

**84. Resolution of complaint by conciliation**

The Tribunal--

- (a) may endeavour, by all such means as to it seem reasonable, to resolve by conciliation a complaint that is the subject of an inquiry; and
- (b) shall take all such steps as to it seem reasonable to effect an amicable settlement of a complaint that is the subject of an inquiry and for this purpose may adjourn an inquiry at any stage to enable the parties to negotiate with a view to settlement of the complaint by amicable arrangements.

**85. Consent orders**

(1) The parties to an inquiry or their representatives may file a written consent to the making by the President of any order which the Tribunal is empowered by this Ordinance to make.

(2) On the filing under subsection (1) of a written consent, the registrar shall bring the complaint to which that consent relates before the President, who may, if the President thinks fit and without any other application being made, make the relevant order in accordance with the terms of that consent.

(3) An order made under subsection (2) shall state that it is made by consent and shall be of the same force and validity as if it had been made by the Tribunal after the holding of an inquiry.

**86. Evidence and findings in other proceedings**

In the course of an inquiry, the Tribunal may--

- (a) receive in evidence the transcript of evidence in any proceedings before a court or tribunal and draw any conclusions of fact therefrom that it considers proper;
- (b) adopt any findings, decision or judgment of a court or tribunal that may be relevant to the inquiry; and
- (c) receive in evidence any report of the Commission or a Commissioner that may be relevant to the inquiry if a copy of that report has been made available to every party to the inquiry .

**87. Evidence**

For the purposes of any inquiry, the Tribunal--

- (a) shall not be bound by the rules of evidence and may inform itself on any matter it thinks fit;
- (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms; and
- (c) may give directions relating to procedure that in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties.

**88. Inquiries may be held in private**

(1) Subject to subsection (2), an inquiry shall be held in public.

(2) The Tribunal may, of its own motion or on the application of a party to the inquiry, if it is satisfied that it is appropriate to do so, direct that an inquiry, or a part of an inquiry, be held in private.

**89. Tribunal may prohibit publication of evidence**

(1) The Tribunal may direct that--

- (a) any evidence given before it;
- (b) the contents of any document produced to the Tribunal; or
- (c) any information that might enable a person who has appeared before the Tribunal to be identified,

shall not be published, or shall not be published except in such manner, and to such persons, as the Tribunal specifies.

(2) Nothing in this section shall be taken to derogate from the Tribunal's powers under section 88.

(3) A person who contravenes a direction given by the Tribunal under this section, commits an offence and is liable--

- (a) in the case of a natural person, to a fine of \$10,000; or
- (b) in the case of a body corporate, to a fine of \$50,000.

**90. Immunity of members of Tribunal and witnesses**

The members of the Tribunal and persons called to give evidence before the Tribunal shall enjoy all the privileges and immunities of judges of the District Court and witnesses called to give evidence before the District Court respectively.

**91. Tribunal may dismiss certain complaints**

(1) Where, at any stage of an inquiry, the Tribunal is satisfied that a complaint is frivolous, vexatious, misconceived or lacking in substance, or that for any other reason the complaint should not be entertained, it may dismiss the complaint.

(2) Where the Tribunal dismisses a complaint under section (1), it may order the complainant to pay the costs of the inquiry.

**92. Interim orders**

The Tribunal or, where the President of the Tribunal is of the opinion that it is expedient that the President alone should exercise the functions of the Tribunal under this section, the President, may, on the application of the Commissioner, or on the application of a party to an investigation at any time after the lodging of the complaint into which that investigation is held, make an interim order to preserve -

- (a) the status quo between the parties to the complaint; or
- (b) the rights of the parties to the complaint,

pending determination of the matter that is the subject of the complaint.

**93. Decisions of Tribunal**

(1) After holding an inquiry, the Tribunal may make an order which it considers just and appropriate in the circumstances.

(2) Without limiting the generality of the power conferred by subsection (1), the Tribunal may--

- (a) make a declaration that the respondent has engaged in conduct, or committed an act that is unlawful under this Ordinance, the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994), and order that the respondent should not repeat or continue such unlawful conduct;
- (b) order that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
- (c) order that the respondent defendant should employ or re-employ the complainant;

- (d) order that the respondent should promote the complainant;
- (e) order that the respondent pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the defendant's conduct;
- (f) order that the respondent defendant pay to the complainant punitive or exemplary damages; or
- (g) make an order declaring void in whole or part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994); or
- (h) declare that a legislative provision has been repealed in whole or part, or that a rule of the common law has been abrogated.

(3) In exercising its power under subsection (1) to order that the respondent pay to the complaint a sum of money by way of damages, the Tribunal may order the payment of a sum in excess of the maximum sum which can be awarded by the District Court in civil proceedings.

#### **94. Costs**

(1) Except as provided by subsection (2) and section 91(2), each party to an inquiry shall pay the party's own costs.

(2) Where the Tribunal is of the opinion in a particular case that there are exceptional circumstances that justify its doing so, it may make such order as to costs as it thinks fit.

(3) A reference to exceptional circumstances in subsection (2) includes circumstances--

- (a) in which a frivolous or vexatious action or is commenced;
- (b) when an action is based on allegations made in bad faith;
- (c) when a defence or counter-claim is frivolous, vexatious or has no reasonable prospect of success; or
- (d) when a party's conduct of proceedings involves unnecessary and deliberate delay or prolongation of the proceedings.

(4) In exercising its power under subsection (2), the Tribunal shall pay due regard to the need to facilitate access to the courts in order to ensure that affordable and effective remedies are available for violations of the rights conferred by the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Equal Opportunities Ordinance ( of 1994).

#### **95. Recovery of amounts payable under order of Tribunal**

Any amount ordered to be paid by the Tribunal under this Part may be registered as a judgment debt in a court of competent jurisdiction.

**96. Compliance with order of Tribunal**

A person who refuses or for any reason fails to obey or comply with an order referred to in section 93, or an interim order, of the Tribunal, commits an offence and is liable--

- (a) in the case of a natural person, to a fine of \$10,000; or
- (b) in the case of a body corporate, to a fine of \$50,000.

**97. Reasons for decision of Tribunal**

(1) Where the Tribunal does not state its reasons for any decision or order made in relation to an inquiry, a party to the inquiry may, by notice in writing served on the Tribunal within 7 days after the date of that decision or order, require the Tribunal to state its reasons.

(2) The Tribunal shall, within 14 days after the service of a notice under subsection (1), state its reasons for the decision or order referred to in the notice.

**98. Authentication of documents**

Every document requiring authentication by the Tribunal may be sufficiently authenticated if it is signed by the President of the Tribunal.

**99. Judicial notice of certain signatures**

Judicial notice shall be taken of the signature of the President of the Tribunal or the registrar when appearing on a document issued by the Tribunal.

**100. Appeals**

(1) A party aggrieved by a decision or order of the Tribunal made under sections 91, 92, 93 or 94(2), or by an interim order made under section 92, may appeal to the Court of Appeal on a question of law--

- (a) except as provided in paragraph (b), within 21 days after the date of that decision or order; or
- (b) where a notice has been served on the Tribunal under section 97(1), within 21 days after the date on which the Tribunal states its reasons for that decision or order under section 97(2).

(2) An appeal shall be made in accordance with the rules of court.

(3) The Court of Appeal may, in a particular case, extend the time within which an appeal may be commenced under subsection (1).

(4) The Court of Appeal shall hear and determine the question of law arising on the appeal and shall--

- (a) remit the decision of the Court on that question to the Tribunal; or

- (b) make such other order in relation to the appeal as to the Court seems fit.

(5) The Tribunal and any member of the Tribunal shall not be liable to any costs in respect of the decision or order of the Tribunal or the appeal.

### **101. Appeals against refusal of exemptions**

The Tribunal shall have jurisdiction to consider appeals against a refusal by the Commission to grant an exemption or further exemption under section 54.

## **PART VIII MISCELLANEOUS**

### **102. Obligations of government in respect of reports to international bodies**

(1) Where a report is required to be prepared for submission to an international human rights body, the Attorney General shall forward to the Commission a copy of the draft of the report for comment.

(2) The government shall include in its report a copy of any comments made by the Commission, in a separate part of the report in which the comments are identified as those of the Commission.

(3) Without limiting the generality of subsection (1), this section applies to reports required to be submitted in respect of Hong Kong under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention concerning Freedom of Association and Protection of the Right to Organize (ILO No. 87), and the Convention concerning the Right to Organize and Collective Bargaining Convention (ILO No. 98).

### **103. Declaration of international instruments**

(1) The Attorney General may declare an international instrument, being--

- (a) an instrument ratified or acceded to by or on behalf of Hong Kong, or which has effect in relation to Hong Kong; or
- (b) a declaration that has been adopted by Hong Kong,

to be an international instrument relating to human rights and freedoms for the purposes of this Ordinance.

- (1)--
- (2) Where the Attorney General makes a declaration under subsection
- (a) there shall be published in the Gazette--
    - (i) a copy of the international instrument;
    - (ii) a copy of Hong Kong's instrument of ratification or accession to the international instrument or of the terms of any explanation given by Hong Kong of its vote in respect of the international instrument; and
    - (iii) a copy of the instrument of declaration under subsection (1); and
  - (b) it has effect on and from the date on which the copies referred to in paragraph (a) were published in the Gazette or, if those copies were published in the Gazette on different dates, on the later or latest of those dates.

#### **104. Victimization**

(1) It is unlawful for a person (in this section referred to as "the victimizer") to subject, or threaten to subject, another person (in this section referred to as "the person victimized") to any detriment on the ground that the person victimized or an associate of that person--

- (a) has lodged, or proposes to lodge, a complaint, or has brought, or proposes to bring, proceedings under this Ordinance against the victimizer or any other person;
- (b) has furnished, or proposes to furnish, any information, or has produced or proposes to produce, any documents in relation to inquiry, investigation or proceedings under this Ordinance;
- (c) has appeared, or proposes to appear as a witness in any inquiry, investigation or proceedings under this Ordinance;
- (d) has reasonably asserted, or proposes to assert, any rights of the person victimized or the rights of any other person under this Ordinance; or
- (e) has made an allegation that a person has done an act that is unlawful by reason of this Ordinance, the Hong Kong Bill of Rights Ordinance (Cap. 383) or the Equal Opportunities Ordinance ( of 1994),

or on the ground that the victimizer believes that the person victimized has done, or proposes to do, an act or thing referred to in any of paragraphs (a) to (e).

(2) Subsection (1)(e) does not apply if it is proved that the allegation was false and was not made in good faith.

(3) Subject to subsection (2), the application or continued application of subsection (1) in a particular case shall not be affected by--

- (a) the failure of the person victimized to do any proposed act or thing referred to in any of the paragraphs of subsection (1); or



- (b) the withdrawal, failure to pursue, or determination of any proceeding or allegation under this Ordinance.

#### 105. Non-disclosure of personal information

(1) A person who is, or has at any time been, a member of the Commission or a member of the staff referred to in section 16 or is acting, or has at any time acted, on behalf of the Commission shall not, either directly or indirectly, except in the performance of a duty under or in connection with this Ordinance or in the course of acting on behalf of the Commission--

- (a) make a record of, or divulge or communicate to any person, any information relating to the affairs of another person acquired by the first-mentioned person by reason of that person's office or employment under or for the purposes of this Ordinance or by reason of that person acting, or having acted, on behalf of the Commission; or
- (b) to produce in a court a document relating to the affairs of another person of which the first-mentioned person has custody, or to which that person has access, by reason of that person's office or employment under or for the purposes of this Ordinance or by reason of that person acting, or having acted, on behalf of the Commission,

except where it is necessary to do so for the purposes of this Ordinance.

(2) Nothing in this section prohibits a person from--

- (a) making a record of information that is, or is included in a class of information that is, required or permitted by an Ordinance to be recorded, if the record is made for the purposes of or pursuant to that Ordinance;
- (b) divulging or communicating information, or producing a document, that is, or is included in a class of information that is or class of documents that are, required or permitted by an Ordinance to be divulged, communicated or produced, as the case may be, if the information is divulged or communicated, or the document is produced, for the purposes of or pursuant to that Ordinance.

(3) Nothing in subsection (1) prevents a person being required, for the purposes of or pursuant to an Ordinance, to divulge or communicate information, or to produce a document, that is, or is included in a class of information that is or class of documents that are, required or permitted by that Ordinance to be divulged, communicated or produced.

(4) Nothing in subsection (1) prevents a person being required, for the purposes of or pursuant to an Ordinance, to divulge or communicate information, or to produce a document, that is, or is included in a class of information that is or class of documents that are, required or permitted by that Ordinance to be divulged, communicated or produced.

(5) In this section--

"court" ( ) includes any tribunal, authority or person having power to require the production of documents or the answering of questions;

"produce" ( ) includes permit access to.

**106. Ordinance not to affect action to have legislation declared repealed or invalid**

Nothing in this Ordinance restricts the right of a person to challenge a provision of a law before a court on the ground that the law has been repealed by virtue of the Hong Kong Bill of Rights Ordinance (Cap. 383) or by virtue of the Equal Opportunities Ordinance ( of 1994), or on the ground that it is inconsistent with article VIII(3) of the Hong Kong Letters Patent 1917 to 1992 (App. I p. C1).

**107. Regulations**

The Governor may make regulations, not inconsistent with this Ordinance, prescribing matters---

- (a) required or permitted by this Ordinance to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance.

**CONSEQUENTIAL AMENDMENTS**

**Equal Opportunities Ordinance**

**108. Amendment of Equal Opportunities Ordinance (of 1994)**

Section 232 of the Equal Opportunities Ordinance ( of 1994) is repealed and the following section substituted--

**"232. Effect of contravention of Ordinance**

(1) This Ordinance does not confer on a person a right of action in respect of the doing of an act that is unlawful under this Ordinance unless a provision of this Ordinance expressly provides otherwise.

(2) Subsection (1) does not restrict the right of a person to challenge a provision of a law before a court on the ground that the law has been repealed by virtue of the provisions of this Ordinance."

**109. Sections repealed**

Sections 229, 230, 231, 232 and 234 of the Equal Opportunities Ordinance ( of 1994) are hereby repealed.

**Commissioner for Administrative Complaints Ordinance**

**110. Departments and Organizations to which this Ordinance applies**

Schedule 1 to the Commissioner for Administrative Complaints Ordinance (Cap. 397) is amended by adding-- "Human Rights and Equal Opportunities Commission".

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**SCHEDULES**

**SCHEDULE 1** [s. 2]

**International Covenant on Civil and Political Rights**

**SCHEDULE 2** [s. 2]

**International Covenant on Economic, Social and Cultural Rights**

**SCHEDULE 3** [s. 2]

**International Convention on the Elimination of All Forms of Racial  
Discrimination**

**SCHEDULE 4** [s. 2]

**Convention on the Elimination of All Forms of Discrimination Against  
Women**

**SCHEDULE 5** [s. 2]

**Convention Against Torture and Other Forms of Cruel, Inhuman or  
Degrading Treatment or Punishment**

**SCHEDULE 6** [s. 2]

**Convention on the Rights of the Child**

**SCHEDULE 7** [s. 2]

**Convention concerning Freedom of Association and Protection of the  
Right to Organize (ILO No 87)**

**SCHEDULE 8** [s. 2]

**Convention concerning the Right to Organize and Collective Bargaining  
(ILO No 98)**

**SCHEDULE 9** [s. 2]

**Declaration on the Rights of Mentally Retarded Persons**

**SCHEDULE 10** [s. 2]

**Declaration on the Rights of Disabled Persons**

**SCHEDULE 11** [s. 2]

**Declaration on the Elimination of Violence Against Women**

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