UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
GENERAL

CCPR/C/HKSAR/99/1
16 June 1999

Original: ENGLISH

HUMAN RIGHTS COMMITTEE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA*

[11 January 1999]

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* The present report has been submitted by the Government of the People's Republic of China. Although China is not a State party to the International Covenant on Civil and Political Rights, the Government notified the Secretary-General of the United Nations of the continuing application of the Covenant in the Hong Kong Special Administrative Region by a letter dated 4 December 1997.

The first part of the original text (General profile) has been incorporated in the revised core document of China (HRI/CORE/1/Add.21/Rev.1). The annexes are available for consultation in the files of the secretariat in English, as received from the Government of China. The previous report relating to Hong Kong submitted by the then administrating State, the United Kingdom of Great Britain and Northern Ireland, is available in document CCPR/C/95/Add.5; for its consideration by the Committee, see CCPR/C/SR.1469, CCPR/C/79/Add.57 and Official Records of the General Assembly, Fifty-first Session, Supplement No. 40 (A/51/40), paragraphs 47 to 72. In accordance with a request of the Committee, a special report was submitted subsequently (CCPR/C/117); for its consideration by the Committee, see CCPR/C/SR.1535 and 1536, CCPR/C/79/Add.69 and Official Records of the General Assembly, Fifty-second Session, Supplement No. 40 (A/52/40), paragraphs 78 to 85.

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Introduction

1. On 1 July 1997, the Government of the People's Republic of China resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region (HKSAR). Article 12 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China - Hong Kong's constitutional document - provides that "The HKSAR shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government". Under the principle of "One country, two systems", the socialist system and policies are not to be practised in Hong Kong and the previous capitalist system and way of life shall remain unchanged for 50 years.

2. In accordance with the provisions of the Sino-British Joint Declaration on the Question of Hong Kong, and the Basic Law, and taking into account the fact that the People's Republic of China is not yet a party to either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, the Government of China notified the United Nations Secretary-General on 4 December 1997 of the arrangements for the HKSAR to report to the United Nations in the light of the relevant provisions of the two Covenants.

3. In early 1998, the Government of China notified the United Nations that the HKSAR was prepared to submit its first reports in the light of the relevant provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1998.

4. The present report is the first report on the implementation of the International Covenant on Civil and Political Rights in the HKSAR in the light of article 40 of the Covenant. It covers the period from 1 July 1997 to 30 June 1998.

5. The report has been compiled in accordance with the guidelines regarding the form and contents of initial reports from States parties (CCPR/C/5/Rev.2).

Article 1. Progress and development of democracy

6. The Basic Law sets out the blueprint for the development of democracy in the HKSAR. Article 45 prescribes the principles by which the Chief Executive shall be selected. It also states that the specific method for selecting the Chief Executive shall be as prescribed in annex I to the Basic Law. 1/ That is:

> The Chief Executive shall be elected by a broadly representative Election Committee;
>
> The Committee shall be composed of 800 members who shall be drawn from the sectors prescribed in paragraph 2 of the Annex; however
>
> The Selection Committee for the first Chief Executive shall be composed of 400 members in accordance with the "Decision of the National People's Congress on the Method for the Formation of the First Government and the

First Legislative Council of the Hong Kong Special Administrative Region" (see annex I to the present report, pp. 65-67).

The first Chief Executive was accordingly elected in December 1996.

7. Article 45 of the Basic Law provides that the "ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures".

8. Annex I to the Basic Law permits amendments to the method for selecting the Chief Executive for terms subsequent to the year 2007. Any such amendments would require the endorsement of a two-thirds majority of all Legislative Council members and the consent of the Chief Executive, and they must be reported to the Standing Committee of the National People's Congress (NPC) for approval.

9. Similarly, Annex II to the Basic Law permits amendments to the method for forming the Legislative Council after 2007. Again, such amendments would require the endorsement of a two-thirds majority of all Legislative Council members and the consent of the Chief Executive, and they would need to be reported to the Standing Committee of NPC for the record.

10. The first Legislative Council of the HKSAR was elected on 24 May 1998. Twenty (one third) of its members were elected by universal suffrage. In accordance with article 69 of the Basic Law, its term of office shall be two years (1998-2000). From 2000 onwards, the term of subsequent Legislative Councils shall be four years. Annex II to the Basic Law provides that the number of directly elected members shall increase to 24 in the second term (2000-2004) and to 30 for the third (2004-2008). Article 68 of the Basic Law provides that the ultimate aim is to elect all the members of the Legislative Council by universal suffrage. A full discussion is contained in paragraphs 461 to 465 below in relation to article 25.

Article 2. Ensuring to all individuals the rights recognized in the Covenant

Human rights provisions in the Basic Law and the Hong Kong Bill of Rights Ordinance

11. The legal context in which human rights are protected is set out in paragraphs 96 to 114 of the revised core document of China (CCPR/CORE/1/Add.21/Rev.1). The following paragraphs discuss developments arising from and since the transfer of sovereignty.

Review of laws since June 1991

12. As explained in the previous report, 2/ after the Hong Kong Bill of Rights Ordinance (BORO) came into operation in June 1991, the Government reviewed local laws in the light of its provisions. By 30 June 1997, some 41 amending ordinances and subsidiary legislation had been enacted to bring existing laws into line with BORO and hence with the Covenant. A list of the amending laws is contained in annex 3. They are now part of the laws

of the HKSAR by virtue of article 8 of the Basic Law. In compliance with article 39 of the Basic Law, 3/ the Government has continued to ensure that before its submission to the legislature every new legislative proposal is consistent with the Covenant as applied to Hong Kong.

Non-adoption of certain provisions of BORO

13. The non-adoption of sections 2 (3), 3 and 4 of BORO is revised in the core document of China (paras. 103-104). Some commentators have expressed the view that this has "relegated" from a legal requirement to an administrative practice, the process of ensuring that new laws conform with BORO or the Covenant. It has not. By virtue of article 39 of the Basic Law, new laws must conform with the provisions of the Covenant. Conforming with the Covenant necessarily entails conforming with BORO.

The Hong Kong Bill of Rights (Amendment) Ordinance 1997

14. The Hong Kong Bill of Rights (Amendment) Ordinance 1997 was introduced into the former Legislative Council as a members' bill. It passed into law in late June 1997. Its stated aim was to reverse a Court of Appeal decision Tam Hing-yee v. Wu Tai-wai [1992] 1 HKLR 185, which is explained in paragraph 18 below. However, it had been brought into law at the final meeting of the former Legislative Council, without scrutiny by a bills committee and, in the Government's view, its wording gave rise to confusion. Accordingly, the Government proposed suspending the Ordinance's provisions to allow time to examine its implications. The Provisional Legislative Council approved this in July 1997.

15. Having carefully examined the Ordinance's provisions, the Government concluded that, as it had suspected, they did have the effect of introducing confusion into the law and should therefore be repealed. That repeal was effected by the passage into law of the Hong Kong Bill of Rights (Amendment) Ordinance 1998 in February 1998. The Government's decision has engendered considerable debate and some commentators believe that it was a retrograde step in the development of human rights protection. The Government disagrees. But the issue is technical and complex and we believe that the Committee will need additional background in order to assess the balance of argument. That background is provided in the following paragraphs.

Hong Kong Bill of Rights (Amendment) Ordinance 1997: background to the repeal

16. BORO, as enacted in 1991, binds only the Government and public authorities. Prior to its enactment, there was discussion as to whether the Ordinance should also bind private citizens; that is, whether private citizens should be liable to legal sanctions if they violated the rights and freedoms of other citizens guaranteed under BORO. In the end, the then Legislative Council decided that BORO should not apply to such actions. Section 7 of BORO makes it clear that the Ordinance binds the Government and public authorities only. 4/

17. Notwithstanding the clear intention of the legislature in enacting section 7, doubts remained in some quarters as to whether BORO could be invoked in inter-citizen actions. Those doubts arose from the provision in

the then section 3 of the Ordinance that all pre-existing laws which did not admit of a construction consistent with BORO were, to the extent of the inconsistency, repealed. Section 3 did not distinguish between situations where the Government or public authorities were party to the case and those where both parties were private citizens. As explained in the revised core document of China, section 3 was subsequently not adopted as part of the laws of the HKSAR because of its overriding effect on other laws, including the Basic Law.

18. The doubts over the extent to which section 3 could be invoked in inter-citizen actions were argued in the case of Tam Hing-yee v. Wu Tai-wai heard by the Court of Appeal in 1991. The Court of Appeal ruled that, by virtue of section 7, BORO had no application to disputes between individuals. This restriction also applied to the repealing effect of BORO on pre-existing legislation. In other words, BORO repealed inconsistent pre-existing legislation only when that legislation was relied upon by the Government. But the same legislation would remain in force when relied upon by private citizens. The stated aim of the Hong Kong Bill of Rights (Amendment) Bill 1997 was to reverse this ruling.

19. The 1997 Amendment Ordinance added two new subsections to BORO:

Section 3 (3) "It is hereby declared to be the intention of the legislature that the provisions of this Ordinance, including the guarantees contained in the Bill of Rights, apply to all legislation, whether that legislation affects legal relations between the Government, public authorities and private persons, or whether it affects only relations between private persons.

Section 3 (4) "For the avoidance of doubt, subsection (3) shall come into operation upon commencement of the Hong Kong Bill of Rights (Amendment) Ordinance 1997 (107 of 1997)."

20. The Government considered that the drafters of these provisions took insufficient account of the effect of their wording in relation to section 7 of BORO (para. 17 above). This appeared to introduce confusion into the law and the Government needed time to examine the provisions and to form an opinion on their implications for section 7. For this reason, as explained in paragraph 14, the Government proposed, and the Provisional Legislative Council approved, the suspension of the 1997 amendments with effect from 18 July 1997.

The Hong Kong Bill of Rights (Amendment) Ordinance 1998

21. In January 1998, after some six months' study, the Government concluded that the new section 3 (3), when read with section 7, could give rise to more than one interpretation and would constitute a source of legal uncertainty. As the Government saw it, the possible interpretations were:

(a) Section 7 of BORO prevailed and the 1997 Amendment Ordinance did not reverse the Court of Appeal ruling in Tam v. Wu (so failing to achieve its stated aim); or

(b) The Amendment Ordinance reversed Tam v. Wu so that notwithstanding section 7, as from 30 June 1997 when the 1997 Amendment Ordinance took effect, all pre-existing legislation inconsistent with BORO was repealed, regardless of whether such legislation was invoked by Government/public authority or private citizen; or

(c) The 1997 Amendment Ordinance did more than reverse Tam v. Wu. The two new subsections introduced under the 1997 Amendment Ordinance prevailed over section 7, thereby imposing obligations on private citizens contrary to the original intent of BORO.

22. The Government considered amending the new subsections to clarify the legislative intent of the members' bill. But it concluded that existing measures had already accomplished what the new subsections set out to achieve. For example, since 1991, the Government had amended laws that were inconsistent with the International Covenant on Civil and Political Rights, including laws that concerned only inter-citizen relations. At the same time, new laws also had to be consistent with the Covenant. More fundamentally, by virtue of article 39 of the Basic Law, the provisions of both the International Covenants on Human Rights as applied to Hong Kong shall remain in force in the HKSAR. Thus, the decision in Tam v. Wu was increasingly academic in practical effect. And the changes effected by the 1997 Amending Ordinance were substantively redundant.

23. The 1998 Amendment Ordinance came into operation on 28 February 1998, restoring the position whereby BORO binds only the Government and public authorities.

24. In paragraph 10 of its concluding observations on the previous report, the Committee expressed concern that there was no legislation to provide effective protection against violations of Covenant rights by non-governmental actors. The same concern has been expressed by other commentators, some of whom have proposed the repeal of section 7, thereby extending BORO to private actions. 5/ The Government remains strongly of the view that the ordering of relations between private persons is better achieved through specific legislation or other measures aimed at particular problems than through the broad provisions of BORO. The traditional and primary function of bills of rights, such as BORO, is to protect citizens against the infringements of their rights by the State. Where such infringements are, or may be, committed by private persons or groups, the Government considers it more productive to examine, individually and in concrete terms, the different ways in which such infringements occur, to consult the public on its findings and, taking into account both the findings and the public response to the consultation, to adopt the measures most appropriate for dealing with any problems that have been shown to exist. Examples of such measures are the Sex Discrimination Ordinance (SDO), the Disability Discrimination Ordinance (DDO), the Family Status Discrimination Ordinance (FSDO) and the Personal Data (Privacy) Ordinance (PDPO) 6/

Human Rights Commission

25. In paragraph 22 of its concluding observations on the previous report, the Committee recommended that the Government should reconsider the

establishment of a human rights commission. The HKSAR Government has carefully reconsidered the recommendation and concluded that its previous assessment was correct.

26. As explained in paragraphs 13 to 16 of the supplementary report, 7/ human rights in Hong Kong are founded on the rule of law, an independent judiciary, a justiciable bill of rights to provide remedies against infringement of human rights, and a sound and comprehensive legal aid system that assures the citizen of access to the courts. These foundations have been strengthened by the constitutional entrenchment of the Covenant and the International Covenant on Economic, Social and Cultural Rights under article 39 of the Basic Law. Additionally, comprehensive safeguards are provided by the Ombudsman's Office, the Equal Opportunities Commission, the Privacy Commissioner's Office and the legislature. The HKSAR Government continues to operate in the full view of a free and active press and local and international non-governmental organizations.

27. This system has served Hong Kong well and has provided a sound framework for the protection and development of human rights in the territory. The Government does not see any obvious advantage in introducing a new institution such as a human rights commission.

Equal Opportunities Commission (EOC)

28. EOC was established under the Sex Discrimination Ordinance (SDO) in May 1996 and started full operation in September that year. The Commission is responsible for conducting formal investigations, handling complaints, encouraging conciliation between parties in dispute, providing assistance to aggrieved persons in accordance with SDO, the Disability Discrimination Ordinance (DDO) and the Family Status Discrimination Ordinance (FSDO). It undertakes research programmes and public education to promote equal opportunities in the community. The Commission is also empowered to issue codes of practice to provide practical guidelines to facilitate public compliance with the laws on equal opportunities. Accordingly, it issued Codes of Practice on Employment in relation to SDO and DDO in December 1996. It issued a similar code in relation to FSDO in March 1998.

29. As at 25 June 1998, the Commission had received 11,554 inquiries and 729 complaints relating to discrimination, of which 360 had been successfully resolved and conciliated.

30. Other major work programmes of the Commission are listed in annex 4.

31. SDO and its implementation are discussed under article 3 (paras. 69-73 below). DDO and its implementation are discussed under article 26 (paras. 490-491 below). So too are FSDO and its implementation (para. 499).

Human rights education

Human rights education in schools

32. Human rights topics form part of the formal curriculum. They are included in the syllabuses for such subjects as Economics and Public Affairs,

Government and Public Affairs, Social Studies, History, Liberal Studies and Ethics and Religious Studies at the secondary school level, and General Studies at the primary school level. Teaching and learning resources support human rights education at different educational levels from kindergarten up to secondary school. In September 1996, the Education Department issued revised "Guidelines on civic education in schools". The Department regularly organizes civic education seminars for teachers. In 1997, it conducted seminars on themes closely related to human rights, namely anti-discrimination, freedom and traditional Chinese values, and modern citizenship.

Human rights education outside schools

33. In the previous report, we informed the Committee of the work of the Committee on the Promotion of Civic Education (sect. A, para. 48 and sect. B, para. 12 of that report). Since then, CPCE has continued to organize and sponsor educational and publicity programmes to foster community awareness of the rights of the individual, equal opportunities and the protection of data privacy. Recently, to ensure that citizens are familiar with their constitutional document, CPCE has been working to promote awareness and knowledge of the Basic Law, which is Hong Kong's constitutional guarantee for the protection of human rights. To this end, in 1998-1999, CPCE will spend over $10 million to produce educational materials, CD-Rom, television and radio programmes to promote human rights and the Basic Law. But the promotion of the Basic Law goes beyond the work of CPCE and other efforts in this regard are discussed in paragraphs 38 and 39 below.

Human rights education for the civil service

34. In paragraph 16 of the previous report, we informed the Committee of the training and education provided to legal officers, government officials and the operational staff of the disciplinary forces in relation to BORO. This has continued. Details are provided in annex 5.

Human rights seminars for judges

35. Hong Kong's judiciary operates within the international world of the Common Law and follows developments in all areas of law, including human rights law, in other common law jurisdictions.

36. The Judicial Studies Board provides continuing education and training for judges. Human rights law is one of many new areas that are emphasized. In paragraph 17 and appendix 6 of the previous report, we informed the Committee of the human rights seminars that Hong Kong judges had attended between 1992 and 1995. Since then, judges continued to participate in visits and human rights seminars both locally and overseas. In 1996, a judge of the District Court visited the Industrial Tribunals and Equal Opportunities Commission in the United Kingdom and a High Court judge attended the International Bar Association Human Rights Seminar in Berlin. In the same year, 10 judges and judicial officers attended a Bill of Rights Seminar in Hong Kong.

37. In 1997, members of the Hong Kong judiciary attended a Conference on Hong Kong Equal Opportunities Law in International and Comparative Perspective in Hong Kong and a Seminar on Women, Human Rights, Culture and Tradition in London. In 1998, the Judicial Studies Board organized a series of talks for judges on administrative law. Judges and judicial officers also participated in the recent Conference on Worldwide Application of the International Covenant on Civil and Political Rights organized by the International Bar Association.

Basic Law Promotion Steering Committee: public education on the Basic Law

38. Because the Basic Law is our constitutional document, and because it enshrines the human rights protections and the civic liberties of all Hong Kong residents, the Government accords high priority to ensuring that all our people know about and understand it. We have discussed the work of CPCE in paragraph 33 above. But the Basic Law is also covered in the school curriculum and in civil service training. Additionally, community-based organizations and individuals promote the Basic Law on a district/local basis.

39. In January 1998, the Basic Law Promotion Steering Committee, comprising both official and non-official members, was established under the chairmanship of the Chief Secretary for Administration to direct the overall strategy for promoting the Basic Law. The Steering Committee will target four groups, namely the local community, teachers and students, the civil service and the overseas “audience”, including visitors to Hong Kong.

The Ombudsman

40. The Ombudsman has jurisdiction over nearly all government departments and agencies, except the police and the Independent Commission Against Corruption (ICAC). 8/ He also has jurisdiction over 14 major statutory bodies. The Government intends gradually to extend the Ombudsman’s jurisdiction to other major statutory bodies.

41. Some commentators have suggested that the Ombudsman’s jurisdiction should be extended to the police, ICAC, the Equal Opportunities Commission, the Office of the Privacy Commissioner for Personal Data and the Electoral Affairs Commission. The Government considers this unnecessary because:

As explained in paragraphs 112 and 113 of the revised core document of China, complaints against the police and ICAC are monitored and reviewed by independent bodies, namely the Independent Police Complaints Council and the ICAC Complaints Committee. These have worked well;

The Equal Opportunities Commission and the Office of the Privacy Commissioner for Personal Data are independent bodies that respectively oversee the protection of equal opportunities and data privacy. There is no obvious need for them to be subject to the Ombudsman’s jurisdiction. Indeed, certain decisions of the Privacy Commissioner are already subject to an independent appeals body, namely the Administrative Appeals Board;

The Electoral Affairs Commission is an independent statutory body chaired by a High Court judge. It is subject to oversight by the legislature and the courts. There is no obvious advantage in additionally subjecting its work to the scrutiny of the Ombudsman.

42. In the year 1996-1997, the Ombudsman received 5,922 inquiries and 2,844 complaints. A total of 360 complaints were investigated. Of these, the Ombudsman found 154 complaints either substantiated or partially substantiated and made some 304 recommendations with a view to redressing grievances and/or proposing administrative improvements. He also completed five direct investigations in relation to which he made 55 recommendations for redress and/or administrative improvement.

43. In paragraph 19 of the previous report, we explained that the Ombudsman's recommendations could not, as some had proposed, be made binding because their implementation could entail the provision of resources (funds) or the amendment of laws, both of which would require the approval of the Legislative Council whose decisions could not be presumed or pre-empted.

44. Those considerations remain valid and, while the Government almost always accepts and acts upon the Ombudsman's recommendations, there are instances where compliance, either partial or full, is not practicable. To ensure that the public is fully aware of the Ombudsman's recommendations and of the Government's response to them:

(a) The Government tables the Ombudsman's annual report in the Legislative Council, informing legislators of, inter alia, the cases the Ombudsman has handled in the year under review and his recommendations;

(b) The Government then tables a formal minute, responding to the Ombudsman's report and, where appropriate, explaining why it has been unable to comply with particular recommendations. This practice began in 1995.

The Administrative Appeals Board

45. In paragraphs 27 and 160 of the previous report, we informed the Committee of the enactment, in 1994, of the Administrative Appeals Board Ordinance (Chapter 442), establishing the Administrative Appeals Board. We explained that the Board provided an open and independent statutory appeal system against administrative decisions in line with article 10 of the Bill of Rights (BOR) (corresponding to article 14 of the Covenant). At the time, the Board was empowered to deal with appeals under 29 ordinances/regulations. Its jurisdiction was to be gradually expanded. As at mid-1998, the Board's jurisdiction extends to the 46 ordinances/regulations in annex 6: an expansion of nearly 60 per cent. We intend to continue the expansion process.

46. Members of the Administrative Appeals Board are appointed by the Chief Executive. The Chairman and Deputy Chairman of the Board are

legally qualified persons. Each appeal to the Board is heard by the Chairman or Deputy Chairman and two panel members. In 1996-1997, the Board heard 28 appeals. Most related to applications for:

Exemption from the payment of business registration fees and levies;

Security personnel permits; and

Firearms licences.

47. The role of the Administrative Appeals Board must be distinguished from that of the Ombudsman. Both are part of the system of administrative redress. Each plays an important but different role. Specifically:

The Administrative Appeals Board provides an independent appeal system against specific administrative decisions made under the ordinances/regulations within its jurisdiction. The Board has the power to confirm, vary or reverse decisions under appeal. Having repealed a decision, the Board may replace it with one of its own decisions or order. Decisions of the Board are binding;

The Ombudsman provides an independent avenue outside the Administration to receive and conduct investigations of complaints against general maladministration in the public sector. The Ombudsman does not handle appeals under ordinances/regulations that fall within the jurisdiction of the Administrative Appeals Board. This is because, by virtue of section 10 (e) (i) of The Ombudsman Ordinance (chap. 397), the Ombudsman shall not undertake investigation into a complaint which relates to any action on which the complainant has a right of appeal or objection to the Chief Executive, the Chief Executive in Council or any tribunal or board constituted under any ordinance. As explained in paragraph 43 above, while the Government almost always acts upon the Ombudsman's recommendations, the Ombudsman's recommendations are not binding.

Municipal Services Appeals Boards

48. The Urban Services Appeals Board and the Regional Services Appeals Board were established in 1990 under the Municipal Services Appeals Boards Ordinance (chap. 220). The Boards consider appeals against certain decisions of the Regional and Urban Councils made under three ordinances/regulations. Those decisions include the award of hawker, liquor and restaurant licences.

49. A list setting out the three ordinances/regulations and details of the decisions against which appeals can be made to the Municipal Services Appeals Boards is provided in annex 7.

50. As with the Administrative Appeals Board, members of the Municipal Services Appeals Boards are appointed by the Chief Executive. The Chairman and Vice-Chairman of the Boards are legally qualified persons. Appeals are heard by the Chairman or Vice-Chairman, two panel members and a Municipal Council member. In 1996-1997, the two Boards heard 36 appeals. All were related to the award of hawker, liquor and restaurant licences.

Follow-up on the report of the Independent Commission Against Corruption Review Committee

51. In February 1994, as explained in paragraphs 20 to 23 of the previous report, the Government set up the ICAC Review Committee to review the powers of the ICAC and its accountability in its exercise of those powers. This was in response to a resolution of the then Legislative Council. As also explained, the Review Committee's report, presented in December 1994, contained 76 conclusions and recommendations (set out in appendix 7 of the previous report). These sought to maintain the powers that ICAC needed to be effective in the battle against corruption; to increase its accountability and transparency in the exercise of those powers; and to ensure those powers were compatible with BORO.

52. At the time of the previous report, a bill incorporating legislative amendments consequent on the Review Committee's recommendations was under consideration by a bills committee of the Legislative Council. The bill was subsequently enacted, in July 1996, as the Prevention of Bribery (Miscellaneous Provisions) Ordinance 1996.

53. The principal changes that the Ordinance introduced were:

(a) Section 10 (2): formerly this contained the presumption that certain assets relevant to a case brought under the Ordinance were in the control of the accused "until the contrary is proved". Now, that presumption only arises in the absence of evidence to the contrary;

(b) Section 20: formerly this enabled statutory declarations or written statements obtained from defendants, pursuant to powers under the Ordinance, to be directly adduced in evidence against them. Now they can only be admitted in evidence against defendants who give evidence that is inconsistent with their previous statements or declarations;

(c) Section 25 provided for a presumption of corruption in certain cases. Section 26 provided the courts with the power to comment on any failure of an accused person to give evidence on oath. Both sections were repealed for consistency with BORO/the Covenant (and with the right to be presumed innocent and the right to remain silent in trial).

Complaints against the Independent Commission Against Corruption: the Independent Commission Against Corruption Complaints Committee

54. In 1997, there were 30 complaints against ICAC and its officers and the ICAC Complaints Committee, whose role is explained in the revised core document of China (para. 113), considered 21 investigation reports submitted by the ICAC investigation unit. Nine were either substantiated or partially substantiated. These included complaints about delays in providing receipts for seized property and the failure to explain to a detainee the reason for his extended detention. In the course of examining the complaints, the Committee has recommended that ICAC improve its procedures and guidelines in several ways. For example, ICAC should give defence counsels copies of videotapes recording interviews of defendants before, rather than after, the

transcripts are made. The aim is to ensure that defence counsels have access to such tapes with the minimum possible delay. ICAC has also amended its "Notice to persons in custody" to make it clear that detainees have the right to seek legal representation at any time.

Complaints against the police

55. In paragraph 34 in section A of the previous report, we explained that complaints against police officers were dealt with by the Complaints Against Police Office (CAPO) under the Commissioner of Police. But they were monitored and reviewed by a civilian body, the Police Complaints Committee. That body is now the Independent Police Complaints Council (IPCC). IPCC comprises non-officials appointed by the Chief Executive from a wide spectrum of the community. Its terms of reference are to monitor and, where it considers appropriate, to review the handling by the police of complaints by the public; keep under review statistics of the types of conduct by police officers which lead to complaints by members of the public; identify any faults in police procedures which lead or might lead to complaints; and where and when it considers appropriate, to make recommendations to the Commissioner of Police or, if necessary, to the Chief Executive.

56. Paragraphs 11 and 12 of the supplementary report explained the measures that the Government had taken since the submission of the previous report to enhance the transparency and credibility of the existing police complaints system. In 1997, 9/ the Committee was advised of further developments that had taken place between May 1996 and June 1997. The Committee may wish to note the developments that have taken place since then:

(a) IPCC observers scheme: the scheme enables IPCC members to conduct scheduled or surprise visits to observe CAPO investigations in progress. The Government and IPCC are working on a plan to increase the Council's ability to conduct such visits by appointing retired IPCC members and other community leaders as additional observers; and

(b) Improvement measures arising from the independent review and the study of overseas systems: the Government has introduced over 40 measures to improve the working of the complaint system. The major ones were described in paragraph 48 of the report submitted on 30 June 1997. The following have been introduced since then:

(i) Performance pledges: CAPO made a formal commitment to handle complaints within various prescribed time limits. For example, complainants must be contacted within two working days; complainants and "complainees" must be kept informed of progress every two months; and every effort must be made to complete investigations within the four-month deadline reported in paragraph 48 (a) of the report submitted on 30 June 1997. In practice, simple cases are completed sooner;

(ii) Transparency: IPCC has continued with the transparency measures reported in paragraph 48 (a) and (c) of the report submitted on 30 June 1997 and, since March 1998, the Council's meetings have been partially open to the public;

(iii) "Tipping-off" outlawed: it has been made a disciplinary offence to "tip-off" an officer who is the subject of a complaint; and

(iv) Publicity: the Government has given the IPCC Secretariat HK$ 3 million for publicity programmes for the period 1997-2000. IPCC and CAPO have made greater efforts to inform the public about the police complaints system and about their work.

Statistics

57. The table below provides an analysis of the results of investigations endorsed 10/ by IPCC between 1995 and 1997.

Result of investigation	1995	1996	1997
(1) Allegations fully investigated			
Substantiated/substantiated other than reported	133	113	135
Not fully substantiated	23	38	60
Unsubstantiated/curtailed	720	804	856
False	70	100	330
No fault	118	116	143
Sub-total:	1 064 (23.0%)	1 171 (23.2%)	1 524 (31.4%)
(2) Cases not fully investigated			
Withdrawn/not pursuable	2 837 (61.2%)	2 909 (57.6%)	2 314 (47.7%)
(3) Informal resolution	732 (15.8%)	972 (19.2%)	1 016 (20.9%)
Total:	4 633	5 052	4 854

Note: A complaint may consist of more than one allegation.

Adaptation of Laws (Interpretative Provisions) Ordinance

58. Article 8 of the Basic Law provides that laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law, shall be maintained, except for any that contravene the Basic Law. The Government is systematically adapting the laws

of Hong Kong to ensure that the terminology used in our statutes reflect Hong Kong's status as a Special Administrative Region of the People's Republic of China (for example, by changing the term "Governor" to "Chief Executive"). It also seeks to ensure that the laws themselves are consistent with the Basic Law.

59. The Interpretation and General Clauses Ordinance (chap. 1 of the Laws of the HKSAR) is one of the laws requiring adaptation. Because it deals with the construction, application and interpretation of Hong Kong laws, and in many instances defines the terms and expressions used in those laws, early adaptation was necessary to forestall any uncertainties that might arise in interpreting the laws so affected.

60. One of the provisions in chapter 1 requiring adaptation was the reference to the "Crown" in section 66. Before adaptation, that section provided that:

> "No ordinance shall in any manner whatsoever affect the right or be binding on the Crown unless it is therein expressly provided or unless it appears by necessary implication that the Crown is bound thereby."

61. In order to reflect the reality of the resumption of sovereignty, the term "Crown" in section 66 is adapted to "State". This does not change the original meaning of the law and both expressions refer to the sovereign Government as well as the regional Government. All ordinances that bind the "Crown" in the past bind the "State" similarly. The definition clearly shows that State-owned enterprises fall outside the definition of "State".

62. The Government has identified 17 ordinances in the laws of Hong Kong which are explicitly binding on the "Government" but are silent as to whether they bind other State organs. It has undertaken to review these ordinances with a view to determining whether the differences in treatment are justified. Any legislative amendments flowing from the review will be submitted to the first Legislative Council of the HKSAR for consideration.

Article 3. Equal rights of men and women

General

63. The three years since the submission of the previous report have been a period of development and consolidation. The various measures foreshadowed in paragraphs 31 to 35 of that report have been realized: the Sex Discrimination Ordinance (SDO) is in full force, the Equal Opportunities Commission (EOC) is fully operational and the provisions of the Convention on the Elimination of All Forms of Discrimination against Women now apply to the HKSAR. These developments are discussed in the following paragraphs.

Convention on the Elimination of All Forms of Discrimination against Women

64. The Convention was extended to Hong Kong in October 1996. In a note dated 10 June 1997, the Government of the People's Republic of China notified the Secretary-General of the United Nations that the Convention would apply to the HKSAR with effect from 1 July 1997. Under the Convention, the HKSAR is

obliged to respect and promote the rights of women and ensure the eradication of all forms of discrimination against them. The Government had already taken significant steps in that direction in July 1995 when the Sex Discrimination Ordinance (SDO) was enacted (see paras. 31-35 of the previous report and paras. 69-73 below).

65. To promote the Convention and the principles it enshrines, the Government has so far published some 12,000 copies of the text. These have been distributed to the public and posted on the Internet. Promotional booklets and various forms of souvenirs have been also distributed to arouse public awareness of the Convention.

66. In compliance with article 18 of the Convention, the Government has submitted to the Central People's Government (CPG) its initial report on the implementation of the Convention in the HKSAR. The report will be submitted to the United Nations in September 1998 as part of China's metropolitan report. We understand that the Committee on the Elimination of Discrimination against Women may examine the report in January 1999. Copies will be made available to the Human Rights Committee in good time before the hearing of the present report.

67. Commentators have proposed that we should withdraw the reservations and declarations that were taken out on our accession to this Convention and reaffirmed in the CPG notification of 10 June 1997 to the Secretary-General of the United Nations. Essentially, these comprise:

(a) General: the right is reserved to protect our immigration laws (discussed below in relation to article 12); to preserve the rights of religious denominations or orders; to preserve rights of male indigenous villagers in respect of property and rent concessions; and to maintain existing regulations and practices (for example, those pertaining to pregnancy) that provide for women to be treated more favourably than men;

(b) Article 11 (equality in employment): the right is reserved to preserve retirement schemes and benefits that provide for differential treatment between women and men. So too is the right to apply any non-discriminatory requirement for a qualifying period of employment for entitlement to maternity leave, maternity leave with pay, and protection against dismissal on the basis of pregnancy;

(c) Article 15 (equality of women before the law): a declaration has been made of our understanding that, where any provisions of a contract are found to be discriminatory, only those terms or elements that are discriminatory will be deemed null and void but not necessarily the contract as a whole.

68. There is no immediate intention of withdrawing these reservations and declarations. They were made to preserve laws and policies that protect the interests of the community as a whole and to make clear the HKSAR interpretation of certain provisions of the Convention. Should changing circumstances suggest that any of them may no longer be necessary, we will review the need for their retention.

Sex Discrimination Ordinance

69. As explained in paragraph 31 of the previous report, SDO was enacted in July 1995. It came into full force in 1996. As previously explained, the Ordinance renders unlawful discrimination on the grounds of sex, marital status or pregnancy in specified areas of activity. Those areas include employment, education, provision of goods, facilities or services, disposal or management of premises, eligibility to vote for and to be elected or appointed to advisory bodies, activities of clubs, and performance of functions and exercise of powers by the HKSAR Government. It also outlaws sexual harassment.

70. The provisions of SDO bind all sections of society, including the Government and public bodies.

71. Since the enactment of SDO, the Government has reviewed legislation that provides for differential treatment for women and men. Where appropriate, legislative amendments have been introduced to remove differential treatment. A list of those amendments is provided in annex 8.

72. In paragraph 13 of its concluding observations on the previous report, the Committee expressed concern that SDO limited the damages awarded to women who were subject to sexual discrimination and did not have power to direct the reinstatement of women who had lost their jobs due to sexual discrimination. By virtue of the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, which was enacted in June 1997, the limit on damages awarded to a claimant who brings an action under Part III of SDO, that is, section 76 (7), was removed, and the District Court was empowered to order reinstatement of the claimant.

73. The Equal Opportunities Commission (EOC) commenced the review of SDO in December 1997, one year after the ordinance became fully operational. The review will help EOC to identify provisions which may require amendment in the light of operational experience before submitting recommendations to the Government by the end of this year.

Equal rights of women in politics

Women in the representative Government structure

74. Women and men enjoy the same right to vote and to stand for election. That right is guaranteed under articles 1 and 21 of the Bill of Rights (BOR) and articles 25, 26 and 39 of the Basic Law. 11/ A person's sex is never a criterion, either directly or indirectly, that may qualify or disqualify a person from being an elector or a candidate.

75. In 1998, there were 1.33 million registered female electors on the General Electoral Roll, some 47.7 per cent of all registered electors at the time. In the Legislative Council election held in May that year, 48.1 per cent of the voters who had cast their votes were female. The corresponding percentages for the elections held in 1995 (municipal councils) and 1994 (district boards), were 47.3 per cent and 48.9 per cent respectively.

76. Of the 166 candidates standing for election to the Legislative Council in May 1998, 24 (or 14.5 per cent) were female candidates. Female members comprised 16 per cent of the Legislative Council, 12 per cent of the provisional municipal councils; and 11 per cent of the provisional district boards.

Women in rural elections

77. In paragraph 42 of the previous report, we explained that there were three levels of election in the villages of the New Territories, the election of village representatives being the first. We also explained that it was the policy of the Heung Yee Kuk (the Government's statutory adviser on New Territories matters) that village representatives should be elected on the basis of one-person-one-vote, equal voting rights for men and women, and a fixed four-year term for the elected representatives. At the time of submitting the previous report in 1995, 62 per cent of villages (430 out of 690) had adopted that system. That figure has risen to 96 per cent (663 out of 693). Others are expected to follow in the near future. As previously explained, SDO provides that the Government shall not approve village representatives where they have been elected or otherwise chosen by a procedure in which women have not been able to participate on equal terms with men. The Government will continue to persuade the remaining villages to comply with the rules.

78. As explained in the paragraph 43 of the previous report, village representatives make up the 27 rural committees which comprise the second level of the rural electoral system, the election of rural committee chairmen being on a one-person-one-vote basis. The chairmen and vice-chairmen of the rural committees are ex officio councillors of the Heung Yee Kuk which, as previously explained, is the third level of the rural electoral system. As previously reported, there is no differentiation between men and women in the election of village representatives or in the election of Heung Yee Kuk committees. Currently, there are 10 women serving as village representatives (out of some 1,000 representatives); 2 serving as rural committee executive committee members (out of a total of 404 such members) and 5 (out of 148) serving as councillors of the Heung Yee Kuk.

Women on advisory boards and committees

79. The network of advisory and statutory bodies is a distinctive feature of Hong Kong's system of government. They are mainly established for the purpose of advising the Government on a broad spectrum of issues, ranging from fundamental livelihood issues to highly specialized and technical subjects. At present, there are over 350 such bodies with a membership of over 5,000 people.

80. Members of these bodies are appointed on their individual merits. The objective is to secure the services of the best persons available, taking account of their abilities, expertise, experience, integrity and commitment to public service. Gender is not a relevant consideration.

Women in public office

81. The Hong Kong civil service is committed to a policy of equal opportunities. There is no discrimination between male and female employees; nor is there any gender requirement in relation to civil service recruitment. Candidates of both sexes are considered on equal terms.

82. The number of women directorate officers in government service has increased from 129 (10.2 per cent) in 1992 to 244 (18.9 per cent) by the end of 1997. In April 1998 (the beginning of the Government's financial year), 19.2 per cent of all directorate officers were women: 88 per cent higher than in 1992. Currently, the highest ranking official in the Hong Kong civil service, the Chief Secretary for Administration, is a woman.

Equal rights of women in education

83. As explained in paragraph 45 of the previous report, the Government's policy is to provide every child, irrespective of sex, with the best possible education from which he or she is capable of benefiting, at a cost that parents and the community can afford. No one is to be deprived of a place in the education system because of lack of means. Women and men have the same opportunity to receive the education of their choice according to their ability. 12/ Since September 1978, schooling has been free and compulsory for all children aged 6 to 15 (normally to the third year of secondary education). The Education Ordinance empowers the Director of Education to enforce school attendance if a child is not attending school without reasonable excuse.

Equality in the school curriculum, higher education and vocational training

84. There is no gender discrimination in the school curriculum. The Education Department is conscious of the need not to condition children to gender-biased aspirations. Schools are encouraged to offer all subjects to both female and male students. In the course of developing the school curriculum, curriculum support materials and textbooks, the Department gives due emphasis to gender equality and makes every attempt to avoid stereotyping. Equality between the two sexes and respect for each other's needs are among the core elements of the syllabuses for Social Studies, Religious Studies and Liberal Studies at the secondary school level, and General Studies at the primary school level. It is also addressed in the newly revised "Guidelines on civic education" and "Guidelines on sex education".

85. Access to post-secondary education or training is open to all according to ability: there is no distinction on the basis of sex. In 1997-1998, the ratio of female to male students in full-time matriculation courses was 1.22:1 (the ratio of female to male population in the 17 to 21 age bracket was 0.98:1). The ratios in relation to full-time vocational and university courses were 0.64:1 and 1.07:1 respectively.

Inheritance of New Territories land

New Territories Small House Policy and article 40 of the Basic Law

86. This subject is discussed under article 11 in the first report of the HKSAR under the International Covenant on Economic, Social and Cultural Rights. It is also addressed in our initial report under the Convention on the Elimination of All Forms of Discrimination against Women.

87. As explained in paragraphs 357 to 359 of the previous report, the New Territories Small House Policy was established in December 1972 to address problems with the standard of rural housing and genuine concerns on the part of the New Territories indigenous community that increasing urbanization would lead to their village lifestyle being swamped or marginalized. The policy enables male indigenous villagers to build houses, once in their lifetime, on either their own land or government land. Some commentators have said that the policy is discriminatory as female indigenous villagers do not benefit from it. We have undertaken to review the policy. A review committee has been set up for this purpose and is examining the various issues relating to the policy, having regard to article 40 of the Basic Law, which concerns the protection of the lawful traditional rights and interests of the indigenous villagers. The aim is to complete the review in 1998.

Protection of pregnant employees

88. In June 1997, we introduced legislative amendments, foreshadowed in paragraph 38 of the previous report, to improve the maternity protection accorded to pregnant employees. Amendments were made to various provisions, including eligibility for maternity leave, flexibility in taking such leave, eligibility for maternity leave pay, employment protection for pregnant employees and prohibition of assignment of heavy, hazardous or harmful work. These improvements are discussed in greater detail in the report under the International Covenant on Economic, Social and Cultural Rights, in relation to article 9 of that Covenant.

Women and age discrimination

89. As explained in paragraph 47 of the previous report, labour unions and women's groups have cited age discrimination as a major employment difficulty which particularly affects women aged 30 or above. At the time, the experience of Hong Kong's Labour Department did not support that view. There was no strong evidence that unemployment amongst middle-aged women was due to age discrimination. Rather, the root of the problem appeared to be a lack of qualifications or skills. This and other factors had, perhaps, given the impression that large numbers of women were losing their jobs as a result of sex and age discrimination. In fact, unemployment and underemployment rates for women were lower than those for men.

90. At the time of drafting the present report, Hong Kong is experiencing an economic downturn and job losses are increasing. For the first time in decades, unemployment has reached 4.5 per cent. Nevertheless, the position as regards age and sex discrimination remains much as described in the previous report. As explained in paragraph 502 below in relation to article 26, the

unemployment and underemployment rates for women remain lower than those for men. And the rates for 30- to 49-year-olds (both men and women) are lower than those for 20- to 29-year-olds.

91. The Government is committed to the elimination of all forms of discrimination in employment, including age discrimination. While there is no legislation forbidding age discrimination in the HKSAR, there is a sustained programme of public education, publicity and self-regulation and employers are encouraged to give their employees equal opportunities so as to enable them to compete equally on the basis of their abilities, aptitude and knowledge. In addition, the Government has ongoing measures to eliminate discriminatory practices in the recruitment of employees. All vacancy orders received by the Local Employment Service of the Labour Department are scrutinized carefully to ensure that no restrictive requirements, including those relating to sex and age, are included. Employers are encouraged to develop, as far as possible, a set of consistent selection criteria, which would provide clear guidance in recruitment, training, promotion, transfer, redundancy and dismissal situations, as well as terms and conditions of employment. These consistent selection criteria should not make reference to age unless it is a genuine job or occupational requirement.

92. The Labour Department has extended its voluntary conciliation service to deal with complaints relating to age discrimination in the employment field. When an employee lodges such a complaint the Labour Department will offer this service to the complainant and his employer. Subject to their agreement, a conciliation meeting will be conducted with a view to assisting both parties in reaching an amicable settlement. As at the end of 1997, no such complaints have been received by the Labour Department.

Article 4. Public emergencies

Emergency Regulations

93. In paragraphs 14 and 15 of its concluding observations on the previous report, the Committee expressed concern that there were no detailed legislation/regulations to cover emergencies. And the Committee regretted that the provisions on that subject of article 18 of the Basic Law 13/ appeared not to correspond with the provisions of article 4 of the Covenant. 14/

94. Should an emergency arise in future, the capacity exists under the Emergency Regulations Ordinance to make new regulations. The provisions of section 5 of BORO (which corresponds to article 4 of the Covenant) and article 39 of the Basic Law (which provides that the provisions of the International Covenants on Human Rights as applied to Hong Kong shall remain in force) together ensure that any such regulations would need to be consistent with article 4 of the Covenant. That is, derogating measures may be taken only to the extent strictly required by the exigencies of the situation and in accordance with law. No measure shall be taken that is inconsistent with any obligation under international law that applies to Hong Kong, that involves discrimination solely on the ground of race, colour, sex, language, religion or social origin, or that derogates from certain specified articles in BOR (corresponding to those of the Covenant).

National laws applicable to Hong Kong in emergency

95. Article 18 of the Basic Law provides that in the event that the Standing Committee of the National People's Congress decides that the HKSAR is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region. The provision only applies to a state of war, or to a situation of turmoil which endangers national unity or security and is beyond the control of the HKSAR Government. This clearly means that the HKSAR Government has the primary responsibility to deal with such turmoil in the first place.

96. Under article 14 (2) of the Basic Law, the HKSAR Government is responsible for maintaining public order in the Special Administrative Region. The police, other local law enforcement agencies and emergency services are staffed, equipped and trained to deal with any conceivable internal security problems which might arise. The possibility of the extreme scenarios envisaged in article 18 of the Basic Law is remote in the light of the public order situation in Hong Kong. Even in those extreme scenarios, article 18 of the Basic Law will be read with article 39 of the Basic Law. In other words, derogating measures may be taken only to the extent strictly required by the exigencies of the situation.

97. Article 14 (3) of the Basic Law does provide for the garrison to assist in the maintenance of public order and in disaster relief, but only at the request of the HKSAR Government. Even in the highly unlikely circumstances that the People's Liberation Army (PLA) garrison were to be required to assist under extreme situations, it would be bound by article 14 (4) of the Basic Law to strictly abide by the laws in force in Hong Kong at the time.

Article 5. Prohibition on destruction of any rights and freedoms recognized in the Covenant

98. As explained in paragraph 52 of the previous report, sections 2 (4) and (5) of BORO reproduce, with adaptation, the provisions of article 5 of the Covenant:

> "2 (4) Nothing in this Ordinance shall be interpreted as implying for the Government or any authority, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Bill of Rights or at their limitation to a greater extent than is provided for in the Bill.
>
> "2 (5) There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in Hong Kong pursuant to law, conventions, regulations or custom on the pretext that the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent."

These provisions are constitutionally entrenched under article 39 of the Basic Law.

Article 6. Right to life

99. The inherent right to life is protected under article 2 of BORO, which gives domestic effect to article 6 of the Covenant.

100. In paragraph 53 of the previous report, we explained that the death penalty had been abolished in April 1993 with the enactment of the Crimes (Amendment) Ordinance 1993. The death sentence for murder had been replaced by mandatory life imprisonment, under section 2 of the Offences against the Person Ordinance (chap. 212). In the cases of treason and of piracy with violence, the death penalty had been replaced with discretionary life imprisonment, to be decided by the court in accordance with section 2 (2) and section 19, respectively of the Crimes Ordinance (chap. 200).

101. In June 1997, section 2 of the Offences against the Person Ordinance was further amended to give the court discretion as to whether a person convicted of murder who was under 18 years of age at the time of the offence should be sentenced to imprisonment for life or to imprisonment for a shorter term.

102. The Government has no intention of reinstating the death penalty.

Deaths in police custody

103. Thorough investigations are conducted whenever it appears that police action may have resulted in the death of a person. The Coroners Ordinance (chap. 504) requires that such incidents be reported to the Coroner as soon as it is reasonably practicable. If it appears that the death of a person may have been caused by a police officer, the Coroner may, or in some cases shall, adjourn the inquest and refer the matter to the Secretary for Justice for a decision as to whether criminal proceedings should be instituted against that officer.

104. Should criminal charges be brought, the Coroner shall not resume the inquest until the conclusion of such proceedings.

105. Between 1 July 1997 and 30 June 1998, eight persons died in the official custody of the police. Four of those cases have been presented before the Coroner. Of them, three were found to have committed suicide and one was found to have died of natural causes. At the time of drafting this report, one case was being tried in the Court of First Instance. The remaining three were under police investigation. The police have introduced improved procedures in relation to the detention of persons. These are discussed in paragraph 158 below in relation to article 9.

Deaths in the custody of the Correctional Services Department

106. When a person dies in the custody of the Correctional Services Department, the Superintendent of the prison shall make a report to the Coroner via the Commissioner of Police as soon as is reasonably practicable. If, at the time of death, the deceased is undergoing a trial, the presiding judge will also be informed. It is mandatory for an inquest with jury to be held in public as soon as the police have completed their investigations.

107. Between 1 July 1997 and 30 June 1998, some 31 prisoners died in custody. Eight of those cases have been presented before the Coroner, who found no misconduct on the part of the Correctional Services Department. The remaining cases are pending openings in the court timetable.

Deaths in the custody of the Customs and Excise Department

108. Deaths in Customs custody are reported to the police for investigation by virtue of section 4 (1) of the Coroners Ordinance. There have been no such deaths since the previous report was submitted.

Article 7. No torture or inhuman treatment and no experimentation without consent

General

109. Much of the material in this section reflects and/or updates material relating to torture contained in the United Kingdom's initial report in respect of Hong Kong under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 15/ It is included here because it remains relevant, valid and, in the Government's view, is of likely interest to the Committee.

Legal protection

110. At the constitutional level, article 28 of the Basic Law provides, inter alia, that no Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body and torture of any resident are also unlawful. Non-residents enjoy this protection by virtue of article 41 of the Basic Law.

111. Additionally, article 3 of BORO gives domestic effect to the protections under article 7 of the Covenant. And, as explained in paragraph 55 of the previous report, torture is prohibited under section 3 of the Crimes (Torture) Ordinance (chap. 427) which gives effect to the provisions of the Convention against Torture. The Geneva Conventions, which inter alia proscribe the torture or inhuman treatment of a person who is a protected person under one of the four Conventions, continue to apply to Hong Kong.

112. As also explained in the previous report (paras. 62-63), additional protections against torture are provided under the Offences against the Person Ordinance (chap. 212) which render it an offence to assault a person. Depending on the circumstances, torture could be involved in the commission of such offences as “murder”, “wounding” and “assault occasioning actual bodily harm”.

Instances of the alleged use of torture

113. There have been no reports of torture as defined in the Crimes (Torture) Ordinance involving the Correctional Services Department, the Customs and Excise Department or ICAC. And, with the special exception of the case discussed in paragraph 114 below, there have been none involving the police.

However, since the Ordinance was enacted, there have been 21 allegations involving the Immigration Department. All were investigated, none were substantiated.

Alleged use of torture by police officers

114. In April 1998, four police officers were found guilty of assaulting a drug addict to force a confession. They were charged and convicted for assault occasioning actual bodily harm under the Offences against the Person Ordinance. The complainant alleged that the police beat him up, poured water into his ears and nose, and stuffed a shoe into his mouth. Commentators have asked why the officers were not charged under the Crimes (Torture) Ordinance. Some have suggested that this was in order to avoid the severe penalties imposed under section 3 of the Ordinance. That view is unfounded.

115. The critical issue in determining whether it is appropriate to lay a charge of torture under section 3 of the Crimes (Torture) Ordinance is whether the prosecution can prove beyond reasonable doubt that an official has intentionally inflicted “severe” pain or suffering on another in the performance or purported performance of his official duties. On an application of the ordinary rules of statutory interpretation concerning criminal statutes, section 3 requires that the prosecution must prove that the accused:

(a) Committed the act which inflicted pain intentionally; and

(b) Intended that his act would result in severe pain.

116. The word “severe” clearly indicates the intention of the legislature to require proof beyond reasonable doubt of a degree of pain above that which is normal in order to qualify as torture. Thus, it would not suffice for a court to be satisfied only that there was an intention to inflict pain. In the case under discussion, those whose duty it was to decide whether to charge and what (if any) charge to lay, 16/ concluded that a charge of occasioning actual bodily harm was the appropriate exercise both of the discretion to prosecute and of the related discretion to select the charge upon which to prosecute. On the basis of published guidelines, they concluded that there was no reasonable prospect of securing a conviction for an offence alleging an offence under section 3 of the Crimes (Torture) Ordinance. In reaching this conclusion, they did not overlook the fact that under section 3 “severe pain” included mental pain.

117. Commentators have said that defendants frequently challenge the admissibility of cautioned statements in courts, alleging that those statements were obtained as a result of impropriety on the part of the authorities. They have urged us to include statistical data on instances of this kind. We are unable to do so as neither the Police nor the Director of Public Prosecutions maintain such statistics. However, a very serious view is taken of the fabrication of “evidence” or its extraction by illegal means. If, in the opinion of a court, a police officer (or an officer of any other disciplined service) has lied under oath or has provided a false statement, the police will investigate the matter. Subject to the advice of the

Secretary for Justice on the evidence available, criminal and/or disciplinary action will be taken as appropriate against the officer concerned. Relevant procedures will be reviewed and changed if and as necessary.

Extradition

118. The Fugitive Offenders Ordinance (chap. 503) enacted in April 1997 17/ gives the Chief Executive a discretion to refuse to order the surrender of a fugitive criminal to another jurisdiction. That discretion would be exercised consistently with the obligation in article 3 of the Convention against Torture not to expel, return (refouler) or extradite persons to States where there are substantial grounds for believing that they would be in danger of being subjected to torture. The Chief Executive's decision is judicially reviewable.

119. There have been numerous cases of the extradition of fugitive criminals from Hong Kong to other countries. But there have as yet been no cases of the Chief Executive (or the former Governor before reunification) having to refuse the surrender of persons on the grounds that they would be in danger of being subjected to torture.

The Fugitive Offenders Ordinance and the Fugitive Offenders (Torture) Order

120. Part II of the Crimes (Torture) Ordinance extended the United Kingdom extradition legislation to Hong Kong and gave effect to the obligations to surrender, in respect of torture offences, fugitive offenders to other jurisdictions to which the Convention against Torture applied. In June 1997, Part II of the Crimes (Torture) Ordinance was repealed and replaced by the Fugitive Offenders (Torture) Order. Like the repealed Part II of the Crimes (Torture) Ordinance, the new Order gives effect to the obligations under the Convention in relation to the surrender of fugitive offenders. It applies procedures for the surrender of fugitives in the Fugitive Offenders Ordinance (chap. 503) to the HKSAR and places outside Hong Kong to which the Convention arrangements relate.

Training of disciplined forces in relation to the provisions of the Convention against Torture and the Crimes (Torture) Ordinance

Police

121. All police officers are trained, in their basic training and in subsequent courses, to treat all persons with humanity and respect, as individuals, and to act within the law at all times. A major purpose of these courses is to ensure the proper treatment of detained and arrested persons. They cover the procedures governing the questioning of suspects, disciplinary codes stipulated in the Police Force Ordinance, Police General Orders and Headquarter Orders. All police officers are made aware that an infringement of laws governing a person's rights could constitute a criminal offence.

Correctional Services Department

122. Staff are made familiar with the relevant legislation and policies through induction courses and through ongoing training (which includes

in-service and development training). The programmes cover the relevant United Nations Standard Minimum Rules, BORO and the provisions of the Crimes (Torture) Ordinance. General training in nursing care enables staff to identify any signs of abuse. Specialist training, such as psychiatric nursing, provides selected personnel with the professional knowledge to assist medical officers to monitor the physical and mental well-being of inmates suspected of having psychiatric problems.

Customs and Excise Department

123. All law enforcement officers in the Customs and Excise Department (whether disciplined or civilian), involved in the custody, interrogation or treatment of arrested or detained persons receive induction training. The training programmes emphasize the need to treat all persons as individuals, with humanity and respect, and to act within the law at all times. They also cover detailed procedures such as the “Rules and directions for the questioning of suspects and the taking of statements” and other internal orders/instructions that ensure the proper treatment of detained or arrested persons.

Immigration Department

124. All immigration officers are trained in the proper handling of suspects in custody. They are required to be familiar with the provisions of the Crimes (Torture) Ordinance and to adhere to relevant subsidiary legislation, such as the Immigration (Treatment of Detainees) Order, and pertinent Immigration Service Standing Orders.

Independent Commission Against Corruption

125. All ICAC officers are made aware that torture is an offence. To ensure that detainees are treated fairly while in ICAC custody, all officers receive comprehensive training on the “Rules and directions for the questioning of suspects and the taking of statements”, BORO and the ICAC (Treatment of Detained Persons) Order.

126. The Treatment of Detained Persons Order contains rules covering detention, notification of relatives, communication with legal advisers, supply of food and drink, provision of toilet facilities, exercise, treatment of sickness and injury and visits by justices of the peace.

127. Interviews of suspects by officers of ICAC are conducted under the Secretary for Security's “Rules and directions for the questioning of suspects and the taking of statements”. Interviews with suspects are normally video recorded. 18/ The resulting tapes and transcripts may be tendered in evidence when a prosecution ensues. The Rules were introduced in 1992 and replace the former Judges' Rules on the same subject. They set out the rights of persons in custody and under investigation, covering such areas as cautioning of suspects, the right to contact friends, the right to private consultation with a legal adviser, the right to obtain copies of any statement made and the right to be provided with reasonable arrangements for refreshment. Failure on the part of law enforcement officers to comply with the Rules may render inadmissible any evidence obtained as a result of such failure.

128. These Rules are intended to ensure that interviews of suspects are conducted fairly and that any resulting confession is not procured by threat or inducement. It is not unusual during the course of criminal trials for the defence to allege breaches of the Rules by law enforcement officers, the objective being to seek to exclude incriminating evidence from the proceedings in the hope that the defendant will be acquitted. In 1997, there were 29 instances of such challenges during the course of trials resulting from ICAC cases. The evidence was ruled inadmissible in six of those instances. In three of them the challenge was based on an allegation that the interviewing officer's questions had been suggestive, repetitive or misleading. In two, it was alleged that an inducement had been made to the defendant. And in one, the defendant claimed that he had believed himself to be a witness rather than a suspect.

Health-care professionals

129. All health-care professionals, particularly doctors and nurses working under the Hospital Authority and the Department of Health, are equipped through their training and education to recognize signs of abuse, including the sequelae of torture and mental anguish. As a matter of routine care, they closely monitor the physical and mental well-being of patients through history-taking, physical examination and, if necessary, laboratory investigation.

Protection for patients detained under mental health legislation

Arrangements for detaining patients under the Mental Health Ordinance

130. The Mental Health Ordinance (chap. 136) defines and protects the rights of detained patients. It also prescribes the criteria for compulsory detention (see below). Even when these very stringent criteria are met, the power to detain is not invoked except in cases where detention in hospital is clearly the most appropriate means of providing the care and treatment that a patient needs, all other means having first been fully considered.

131. The criteria set out in the Mental Health Ordinance for the compulsory admission of persons to hospital are:

(a) They must be suffering from a mental disorder as defined by the Ordinance;

(b) The mental disorder must be of a nature or degree which makes admission to hospital appropriate;

(c) Medical treatment must be necessary for the patients' own health or safety or for the protection of other persons; and

(d) The treatment cannot be provided in some other way, such as on an outpatient basis.

132. The Ordinance requires that a medical assessment must be made before patients are detained in a mental hospital for observation. Prior to committal for observation and treatment, patients have the right to be heard

by a judge or magistrate, if they so wish. If a patient is to be detained for observation, an application should be made to a district judge or magistrate. In relation to a certified patient, the certificate of mental disorder must be countersigned by a district judge. The Ordinance also provides for a system of conditional discharge of patients, with powers of recall for certain patients. There are important safeguards for detained patients. They or their relatives may apply to have the authority for their detention reviewed by the Mental Health Review Tribunal, which is an independent body. The applications may be made 12 months after the patients are liable to be detained or earlier with the leave of the Tribunal. If the patients are not discharged, they may apply again after 12 months or earlier with the leave of the Tribunal. If patients or their relatives do not exercise their right to apply to the Tribunal, their cases will nevertheless be referred to the Tribunal by the medical superintendent (if the patients are liable to be detained in a mental hospital) or by the Commissioner for Correctional Services (if the patients are liable to be detained in the Correctional Services Department Psychiatric Centre) 12 months after the patients or their families are first entitled to apply for review. The Tribunal has the power to discharge a patient, either absolutely or conditionally, if certain criteria are met. But this power does not normally 19/ apply to persons serving sentences of imprisonment pursuant to court orders and who have been transferred to hospital during the period of that sentence. Persons appealing to the Mental Health Review Tribunal against detention may apply for legal aid if they meet the criteria for application.

133. Other safeguards of the rights of detained mental patients include:

(a) All such patients must receive an explanation of their rights under the Mental Health Ordinance. The matters covered must include the right to apply for discharge, the conduct of their treatment, how they can make complaints and their rights in relation to the Mental Health Review Tribunal;

(b) Like all other persons, detained patients are entitled, at their own expense, to seek legal advice or a second opinion. Patients may be represented before the Mental Health Review Tribunal by anyone they wish, except other patients; and

(c) A relative of every detained patient must be kept fully advised of the patient's rights, unless the patient objects.

134. Mental hospital visitors (by tradition, visiting justices of the peace) are required by law to visit hospitals regularly. They are empowered to receive complaints and to make recommendations concerning the hospitals.

Use of Electroconvulsive Treatment (ECT) for mental patients

135. At the hearing of the initial report under the Convention against Torture (November 1995), the Committee against Torture asked whether Hong Kong hospitals made use of ECT and, if so, to what constraints its use was subject. In view of the Committee against Torture's interest in this issue, the Human Rights Committee may wish to be aware of our response and the present position.

136. Like medical institutions elsewhere, public hospitals in Hong Kong use ECT for patients with severe depressive illness, mania or schizophrenia. ECT is considered a safe and effective treatment for patients with strong suicidal tendencies and for those who do not respond well to drug therapy. The technique is applied in accordance with guidelines endorsed by the Quality Assurance Sub-Committee of the Co-ordinating Committee (Psychiatry) of the Hospital Authority. 20/ These guidelines are compatible with international standards, including the recommendations made by the United Kingdom's Royal College of Psychiatrists.

137. Electroconvulsive therapy is only administered with the patient's consent or a second medical opinion. If a patient is not mentally fit to consent to treatment on his own behalf, such consent must be obtained from his/her relatives or guardians and a second expert opinion must be sought to justify the use of the treatment. Physical fitness is carefully assessed before treatment is administered by a specially trained team of anaesthetists, psychiatrists and nurses. The whole procedure is closely supervised and the patient's response is carefully monitored. ECT is part of an individualized treatment plan that is regularly reviewed by the clinical team responsible for the patient concerned.

138. In recent years, the pattern of application has been the following:

	1995-1996	1996-1997	1997-1998
Number of patients receiving ECT	226	191	180
Number of treatments	1 279	1 081	1 080
Average number of treatments per patient	5.65	5.66	6

Protection of persons with mental illness or disability against treatment without consent

139. This issue was addressed in paragraphs 64 and 65 of the previous report. As explained there, a government review group had recommended amending the Mental Health Ordinance to provide more effective protection of patients' rights in respect of medical treatment of an irreversible or controversial nature. Such treatment would include operations such as sterilization and others to be specified by regulation. At the time, doctors had discretion as to whether to seek a declaration from the High Court that the proposed treatment was lawful. The review group proposed that such declarations should be mandatory. These proposals were refined and given legal effect in June 1997 when the Mental Health (Amendment) Ordinance 1997 was enacted.

140. The amending Ordinance introduced a new Part IV C into the Mental Health Ordinance. This concerns the consent procedures for medical and dental treatment of persons who are mentally disordered or mentally handicapped, aged 18 or above, who are incapable of giving valid consent on their own behalf. Its purpose is to ensure that such persons are not deprived of medical or dental treatment because, being incapable of understanding the

nature and effect of the treatment, they cannot give valid consent. The new provisions also improve the legal safeguards available to doctors and dentists.

141. Key features of the new provisions that enhance the protection of patients' rights include:

(a) If a guardian appointed under Part IV B of the Mental Health Ordinance has been granted the power of consent on behalf of an adult mentally incapacitated person (that is, a person who is either mentally disordered or mentally handicapped), doctors or dentists may seek the consent of that guardian before carrying out proposed treatment;

(b) In the event of an emergency, where it is necessary and in the best interests of the patient (see para. 142 below) to receive a particular form of treatment, doctors and dentists will administer treatment without consent; and

(c) Where a guardian who has the power of consent refuses to exercise it, applications for consent will be made to the Court of First Instance.

142. In this context, and for the purpose of the Mental Health Ordinance, “treatment in the best interests of the patient” means treatment in order to:

(a) Save the life of the mentally incapacitated person;

(b) Prevent damage or deterioration to the physical or mental health and well-being of that person; or

(c) Bring about an improvement in the physical or mental health and well-being of that person.

143. Such treatment does not include medical or dental treatment (or both) of an irreversible or controversial nature. Such treatment, referred to as “specified treatment”, always requires the consent of the Court of First Instance.

Article 8. Slavery or servitude; forced or compulsory labour

144. The position remains as explained in paragraph 67 of the previous report. That is, articles 4 (1) and (2) of the Bill of Rights prohibit slavery and the slave trade in all their forms and also the holding of any person in servitude. There is no forced or compulsory labour, which is also prohibited by article 4 (3) of the Bill of Rights. Hard labour is not imposed as a punishment for crime. Consistent with article 8.3 (c) of the Covenant, the term “forced or compulsory labour” in article 4 of the Bill of Rights does not include:

(a) Work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(b) Service of a military character and, where conscientious objection is recognized, any national service required by law of conscientious objectors;

(c) Service exacted in cases of emergency or calamity threatening the life or well-being of the community; and

(d) Work or service which forms part of normal civil obligations.

Foreign workers

145. As explained in paragraph 68 of the previous report, Hong Kong labour legislation does not differentiate between local and foreign employees. Foreign domestic helpers enjoy the same statutory protection as local workers. Some commentators, including the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination, 21/ consider that certain regulations imposed on foreign domestic helpers, particularly the so-called “two-week rule”, are discriminatory.

146. As explained in paragraphs 15 to 18 of the United Kingdom's 14th report on Hong Kong under the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination expressed the concern that, since most of the persons affected by the “two-week rule” were female foreign domestic helpers from the Philippines, it appeared to have discriminatory aspects under the terms of the Convention which might leave workers vulnerable to abusive employers. The Committee recommended that the rule be modified to allow foreign workers to seek new employment in Hong Kong when their employment was terminated.

147. The “two-week rule” was introduced in early 1987 to curb various abuses which had previously been extensive. These abuses included such practices as “job-hopping”, whereby workers deliberately terminated their contracts in order to change employers and stay on indefinitely in Hong Kong. These problems were recognized by the Judicial Committee of the Privy Council (on appeal from the Hong Kong Court of Appeal) in Vergara and Arcilla v. Attorney-General ([1989] 1 HKLR 233). The Judicial Committee rejected a challenge, by way of judicial review, to the validity of the two-week rule. It recognized that the former policy, which permitted foreign workers, upon ceasing employment, to stay in Hong Kong for up to six months, had been abused. In its judgement, the Judicial Committee said:

> “Some [foreign domestic helpers] were deliberately breaking their contracts early in the six-month period in order to work in other part-time or full-time jobs until the period of stay had expired, or in order to find another employer. This gave rise to complaints by the employer who had made all the arrangements to bring the [helper] to Hong Kong and had paid the travel expenses. It also gave rise to complaints by local people who wished to secure employment as part-time domestic helpers and who found themselves in competition with [foreign domestic helpers] who had only been admitted to work full-time. Moreover it resulted in some cases in the employment of [foreign domestic helpers] in jobs for which, under general policy, foreign nationals were not admitted, for example, bars and clubs.”

148. The Government has always rejected any suggestion that the rule is based on or entails racial discrimination either in the literal sense of that term or in the broader sense which it has in the Convention. The rule applies to all foreign domestic helpers and “imported” workers, whatever their country of origin. Most of the persons affected by the rule are indeed female domestic helpers from the Philippines. But it applies equally, and without discrimination, to domestic helpers from other countries and to the “imported” workers, most of whom come from China. The imposition of special restrictions on the employment of foreign workers, as distinct from workers who are permanent residents of the territory, is of course a natural and normal aspect of immigration control, and this particular restriction is an intrinsically appropriate, reasonable and proportionate response to the problems described above.

149. Nevertheless, all necessary measures are taken to ensure a fair balance between the legitimate interests of foreign domestic helpers on the one hand and, on the other hand, those of their employers and the public interest, and to prevent “abusive” treatment by employers. Thus, in exceptional circumstances - especially where there is evidence of abuse by employers, but also if employers are prevented from honouring their contracts because of death, financial difficulties or emigration - permission may be given for workers to change employment without first leaving the territory.

150. In paragraphs 50 to 53 of the third periodic report on Hong Kong under the International Covenant on Economic, Social and Cultural Rights, we addressed the concern of the Committee on Economic, Social and Culture Rights that there were no maximum working hours for foreign domestic helpers. However, except for young persons aged between 15 and 17 working in industrial undertakings, the Employment Ordinance does not impose restrictions on the working hours of workers in Hong Kong. Indeed, it would be impractical to impose such limits for foreign domestic helpers because the nature of household chores is such that their work is done intermittently during the day. However, any helpers who consider that they have been asked to work unreasonably long hours can apply to the Immigration Department to change employers on grounds of maltreatment.

151. The Committee also expressed concern about the fact that, unlike professionals from developed countries, these helpers were not allowed to bring their families to Hong Kong. There are sound practical reasons for this rule, which is by no means discriminatory. Foreign nationals who live and work in Hong Kong may bring their families only if these will not be a burden on Hong Kong’s resources and services. They are responsible for their families’ accommodation and other needs while in the territory.

152. Foreign domestic helpers are hired to work and live in their employers’ homes. Most families in Hong Kong live in small flats, few of which can accommodate more than one additional person. The physical constraints make it practically impossible to allow helpers to bring their families, though family members have always been able to visit them in Hong Kong.

153. The rule also exists for economic and demographic reasons. Given the sheer number of foreign domestic helpers in Hong Kong, allowing their family members to come with them would generate heavy demand on services.

154. Some commentators are under the impression that there is inadequate legal assistance provided for foreign workers and that they have no effective appeal channels when their rights are infringed. This is not the case. As reported in paragraphs 42 to 43 of the United Kingdom's third periodic report in respect of Hong Kong under the International Covenant on Economic, Social and Cultural Rights, foreign workers can seek the assistance of the Labour Department when their rights under the Employment Ordinance and the employment contract are infringed. If there are disputes between foreign workers and their employers, the Labour Department will seek to conciliate the parties. If conciliation fails, foreign workers are entitled to seek the quick and inexpensive legal redress provided by the Labour Tribunal or the Minor Employment Claims Adjudication Board. Foreign workers have the same access to publicly-funded legal aid services as local workers. Publicly-funded legal aid services are available to all regardless of residency, social status, or race. This issue is further discussed in paragraph 287 under article 14.

Article 9. Liberty and security of person

Legal protections

155. At the constitutional level, article 28 of the Basic Law guarantees that "the freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited". 22/

156. The liberty and security of person are further guaranteed under article 5 of BOR, which corresponds to article 9 of the Covenant.

The Law Reform Commission report on arrest 1992

157. In paragraphs 69 and 70 of the previous report, we explained that a government working group was examining the Law Reform Commission's recommendations in the light of the current state of crime in Hong Kong. The Commission had recommended that Hong Kong's law enforcement agencies should adopt certain provisions in the United Kingdom's Police and Criminal Evidence Act 1984. Those provisions prescribed detailed procedural requirements and safeguards to avoid possible abuse of power. A government working group was formed to study these recommendations and formulate proposals in regard to their application. In so doing, it sought to strike a balance between the need for effective law enforcement and the protection of human rights.

158. The working group proposed improvement measures in relation to the powers of law enforcement agencies to stop, search, arrest and detain a person. These proposals were put to public consultation in 1996 and received general support. Accordingly, in June 1997, the Government decided to implement the working group's recommendations over the next three years, priority being accorded to those on detention. Implementation entailed:

(a) Publishing leaflets on the powers and procedures relating to stop, search, arrest and detention;

(b) Formalizing existing practice by appointing “custody officers” to ensure the proper treatment of persons in detention and “review officers” to assess the need for further detention;

(c) Extending the use of videotaping interviews of suspects;

(d) Amending legislation to

(i) Clarify the provisions governing the length of detention;

(ii) Provide continuous and accountable review of the need for longer periods of detention; and

(iii) Provide a statutory right for an arrested person to inform a friend or relative or consult a lawyer privately at any time (again, formalizing an existing practice); and

(e) Improving the standard of detention facilities.

Challenges to lawfulness of detention

159. The remedy of habeas corpus gives effect to the principle expressed in article 5 (4) of BOR, which corresponds to this article. Applications for a writ of habeas corpus can be made under the common law. The common law rules on habeas corpus are heavily influenced by the United Kingdom Habeas Corpus Act 1679 and 1816 and to their historical development. The two Acts used to apply to Hong Kong by a reference in the Application of English Law Ordinance (chap. 88) which ceased to have effect after 30 June 1997. The Supreme Court Ordinance (known after 30 June 1997 as the High Court Ordinance) was amended to include in it provisions of equivalent effect to the relevant provisions of the two Acts. A new section 22 A was added to the Ordinance in June 1997 to provide for applications for and the issue of writs of habeas corpus. Another remedy is by way of application for judicial review.

Relevant statistics

	1995		1996		1997		1998	
	HC	JR	HC	JR	HC	JR	HC	JR
Number of habeas corpus and judicial review applications 23/	4	2	1	0	1	1	6	0
Successful cases	2	0	0	0	0	0	1	0
Unsuccessful cases	1	2	1	0	1	0	1	0
Outstanding cases	1	0	0	0	0	0	4	0
Cases withdrawn	0	0	0	0	0	1	0	0

HC = Habeas corpus
JR = Judicial review

General right to bail

Criminal Procedure (Amendment) Ordinance 1994

160. As explained in paragraphs 92 to 93 of the previous report, the Criminal Procedure (Amendment) Ordinance was enacted in June 1994 to provide a general right to bail and to codify and improve the existing law of bail. The Ordinance came into full operation in September 1995.

Vietnamese asylum seekers

161. As explained in paragraph 96 of the previous report, since 1975 over 200,000 Vietnamese asylum seekers have arrived in Hong Kong; none have been turned away. Over 143,400 have been recognized as refugees and resettled in other countries.

Recognized refugees

162. As at 30 June 1998, there were about 1,140 Vietnamese in Hong Kong who had been granted refugee status and, accordingly, permission to stay in Hong Kong pending resettlement overseas. 24/ They are housed in an open centre at Pillar Point (in the Western New Territories), which is operated by the Office of the United Nations High Commissioner for Refugees (UNHCR). There is no restriction on their movement.

Non-refugees

163. There remain about 660 Vietnamese persons who were determined not to be refugees under the Comprehensive Plan of Action (see below). Most have been released on recognizance and live at the Pillar Point Centre. Their repatriation is discussed in paragraph 164 below. Additionally, some 230 Vietnamese illegal immigrants, who came to Hong Kong illegally in search of employment, are detained like other illegal immigrants. Arrangements are being made for their prompt repatriation to Viet Nam.

Comprehensive Plan of Action

164. As explained in paragraph 101 of the previous report, at the International Conference on Indo-Chinese Refugees (ICICR) hosted by UNHCR in Geneva in June 1989, all the main resettlement and first asylum countries and the country of origin agreed to a Comprehensive Plan of Action (CPA). This provided for the implementation of a fair and just refugee determination process. This process continued despite continuing pressure on Hong Kong and on resources posed by the refugee problem. The key elements of Hong Kong's policy - maintenance of first asylum, screening of new arrivals to determine their status, resettlement of those found to be refugees and safe repatriation to Viet Nam of those found not to be refugees - were all part of CPA. Between March 1989 and 30 June 1998, over 57,000 Vietnamese migrants returned to Viet Nam under a voluntary repatriation programme operated by UNHCR. And since November 1991, over 12,800 Vietnamese (both non-refugees and illegal immigrants) have been repatriated to Viet Nam on 121 flights under the

(non-voluntary) Orderly Repatriation Programme explained in paragraph 111 of the previous report. UNHCR monitors the treatment of returnees. There have been no substantiated cases of persecution or ill-treatment.

Scrapping of the port of first asylum policy

165. At the seventh and last meeting of the Steering Committee of ICICR, held on 5 and 6 March 1996, resettlement and first-asylum countries reaffirmed that the only viable option for the non-refugees was to return to Viet Nam. It was also agreed that CPA would end on 30 June 1996. In the case of Hong Kong, where some 20,000 non-refugees remained, 25/ UNHCR would continue to make appropriate arrangements to resolve the problem as soon as possible after that date.

166. In January 1998, following a comprehensive policy review, the Government decided to end the port of first asylum policy. The decision was made with regard to the new circumstances in Viet Nam and the fact that the more recent arrivals from there had not come to Hong Kong for asylum but for illegal employment.

167. Now, Vietnamese illegal arrivals are treated in the same way as illegal arrivals from elsewhere. That is, they are detained and then repatriated to their country of origin.

Position of the remaining Vietnamese refugees

168. The 1,140 remaining refugees either have no family connections overseas, or have criminal records and/or problems of drug addiction. These factors and “compassion fatigue” in the main resettlement countries mean that their acceptance for resettlement elsewhere will be difficult.

169. At a special meeting in Geneva in May 1997 UNHCR appealed to the international community to help resettlement of the Vietnamese refugees stranded in Hong Kong. Later that year, a government representative echoed this appeal in the October meeting of the UNHCR Executive Committee. 26/ In response, several countries have taken in a small number of refugees (fewer than 100 in the first half of 1998) but most remain. We have continued to press the issue; for example, with the Government of the United Kingdom during the Chief Executive’s visit to London in October 1997 and with the Asia-Pacific Economic Cooperation Council (APEC) economic leaders in Ottawa in November 1997. UNHCR has explored the option of voluntary repatriation to Viet Nam, but only a few are interested. Thus, the resettlement of the remaining refugees is likely to be protracted and some may never be resettled.

Encouraging Vietnamese refugees to be self-reliant

170. The Government seeks to encourage the refugees to lead a normal life and to be self-reliant pending their resettlement. Many are already gainfully employed and self-supporting. Half now live in the general community. To further this process, refugee children will be enrolled in local schools. Services at the Pillar Point Centre will gradually be reduced and residents will be encouraged to seek services, such as medical and social services,

outside the camp in the same way as ordinary Hong Kong residents. UNHCR and the NGOs will continue to help needy refugees. And the Government will provide additional assistance when individual cases so warrant.

171. Commentators have proposed that, on humanitarian and de minimis grounds, the remaining refugees should be offered the opportunity of settling in Hong Kong. It is true that the remaining population of refugees is not large. But the proposal presents great difficulties. Immigration pressures on Hong Kong have been and remain immense, and immigration controls have to be strictly enforced. The spouses and children of Hong Kong residents from mainland China often have to "queue" for several years before joining their families here. Should they enter Hong Kong illegally, they face prompt repatriation to the mainland. It would be unacceptable and unfair to them if the refugees, who have no ties with Hong Kong, are granted residential status.

Vietnamese migrants (non-refugees)

172. Repatriation to Viet Nam remains the primary objective. There are still some 660 non-refugees. They are composed of two groups, namely

(a) The 390 "non-nationals": most of these people are ethnic Chinese. The Government of Viet Nam has been refusing to recognize them as its nationals or to agree to their repatriation. But some 70 of them have family members who have been identified as Vietnamese nationals (see (b) below). They and their families have been released on recognizance and live at the Pillar Point Centre. The Government of Viet Nam has indicated that it will reconsider these particular cases individually if there is fresh information proving that persons concerned are indeed Vietnamese nationals. Progress has been slow. But we will continue to seek the return of all the "non-nationals";

(b) The 270 whose repatriations have been delayed: this group has been "cleared" for return by the Government of Viet Nam. But some 110 of them are family members of the 70 "non-nationals" discussed in (a) above. Others have yet to be repatriated for reasons such as ill health, serving prison sentences, involvement in court proceedings or because they are missing. They will all be repatriated when the factors delaying their repatriation are resolved or, in the case of escapees, when they are recaptured.

Ex-China Vietnamese

173. These people are predominantly ethnic Chinese who fled Viet Nam in the early 1980s and settled in mainland China. Most of those now in Hong Kong arrived without legal documentation in 1993.

174. Before November 1996, the policy was not to screen this group. This was because they had already found protection in mainland China and so, in accordance with the principles in UNHCR conclusions on the international protection of refugees, had lost the right to seek resettlement outside mainland China. Therefore, we took the view that the screening process applied to direct arrivals from Viet Nam did not apply to them and, accordingly, detained them pending their return to mainland China.

175. In November 1996, the Privy Council ruled that Part III A of the Immigration Ordinance, under which some of these persons had been detained, imposed a statutory duty on the Director of Immigration to administer the scheme of immigration control fairly and properly. The Director had the duty to screen for refugee status and to notify the person refused of the right to apply for a review. In compliance with this ruling, we then offered to screen the persons concerned. After detailed inquiries and careful examination, all who underwent the process were "screened-in" as Vietnamese refugees who had settled in China. The mainland authorities undertook to readmit them and that they would again be properly settled and duly protected upon return. Therefore, and again in accordance with the principles in the UNHCR Conclusions, they were then detained pending removal to mainland China.

176. In June 1997, 119 of the families concerned (288 people) initiated habeas corpus proceedings seeking their release from detention. They argued that, since the Director of Immigration had failed to screen them upon their arrival, their detention had been unnecessarily prolonged and hence was unlawful. In September 1997, the Court of First Instance ruled that their continued detention was unlawful and ordered their release. The Government complied and pending appeal accommodated them in the open centres. In December 1997, the Court of Appeal ruled that their detention had been lawful. They then appealed to the Court of Final Appeal which, in July 1998, ruled that most of the applicants - 116 families - were lawfully detained. But the detention of three of the families had been unlawful. 27/

177. The 116 families have initiated judicial review proceedings against the decision to remove them to mainland China. The Government has undertaken not to redetain them until the Court of First Instance has delivered its decision. The Court was considering the case at the time this report was drafted.

Restrictions on mental patients: reform of the Mental Health Ordinance and Regulations

178. In paragraphs 123 and 124 of the previous report, we advised that a review of the Mental Health Ordinance (chap. 136) and its Regulations was in progress. We intended proposing amendments in the 1996-1997 legislative session with the ultimate aim of improving the well-being of persons with mental illness.

179. The various measures then envisaged have since been realized. The legal protections now available to mentally disordered and mentally handicapped persons are significantly stronger than those available in 1995. Specifically

(a) The Mental Health (Amendment) Regulation 1996 came into effect in November 1996. It prevents arbitrary interference in the privacy and freedom of patients in mental hospitals and it prescribes the conditions under which medical superintendents may restrict communication between such patients and persons outside the hospitals;

(b) The Criminal Procedure (Amendment) Ordinance 1996 and the Mental Health (Amendment) Ordinance 1996 also came into effect in November 1996. They provide courts and magistrates with additional "disposal options" 28/ for

accused persons found unfit to plead in criminal proceedings by reason of mental disability. The "additional options" include guardianship orders, supervision and treatment orders, and absolute discharge;

(c) The Mental Health (Amendment) Ordinance 1997 was enacted in June 1997 after a major review of the Mental Health Ordinance. It

(i) Redefined "mental disorder" and introduced a new definition of "mental handicap". The purpose of these changes was to eliminate the misconception that mental disorder and mental handicap were the same thing;

(ii) Clarified the powers of the Court of First Instance in dealing with cases involving management of the property and affairs of mentally disordered and mentally handicapped persons;

(iii) Established an independent Guardianship Board to enforce new guardianship provisions for mentally disordered and mentally handicapped persons aged 18 or above;

(iv) Conferred additional powers on guardians. For example, they may now give consent to medical or dental treatment on behalf of mentally disordered or mentally handicapped adults deemed incapable of giving such consent themselves;

(v) Prescribed the procedures and circumstances under which doctors or dentists might administer treatment without the guardians' consent; and

(vi) Prescribed the procedures and circumstances under which doctors or dentists might administer special treatment 29/ with the approval of the Court of First Instance.

180. We intend to give full effect to these changes when the Guardianship Board is established in late 1998.

Article 10. Rights of persons deprived of their liberty

181. As explained in paragraph 125 of the previous report, the regulation and management of penal establishments in Hong Kong are governed by statutory rules 30/ made by the Chief Executive (formerly, Governor) in Council. Those rules prescribe both the conduct and responsibilities of the persons who staff the institutions and the supervision and care of inmates. They take full account of the Standard Minimum Rules for the Treatment of Prisoners.

The rights of prisoners: protection in law

182. Article 6 of BOR gives domestic effect to the protections under article 10 of the Covenant. The exceptions and savings section of BORO permits restrictions authorized by law on persons lawfully detained in penal establishments to preserve custodial discipline.

Regulation and management of all penal establishments

183. With an establishment of over 7,000 staff, the Correctional Services Department is responsible for the administration of 23 correctional institutions which can accommodate over 12,000 inmates.

184. The objectives of imprisonment are to provide safe and humane custody of offenders and to rehabilitate them. Comprehensive treatment and training programmes have been developed towards that end. These are discussed in paragraphs 189 to 196 below.

Prison Rules - order and discipline in prisons

185. As explained in paragraphs 130 and 162 of the previous report, rule 61 of the Prison Rules (chap. 234, Subsidiary legislation) sets out offences against prison discipline. At that time, some of those offences - because of the nature and severity of the penalty imposed - could be classified as "criminal charges" within the meaning of article 10 of the Bill of Rights (art. 14.1 of the Covenant). In those circumstances, the Government accepted that, rather than being disciplined by the Commissioner of Correctional Services, prisoners charged with such offences should be tried at a fair and public hearing by an independent tribunal. To that end, we proposed abolishing this type of disciplinary offence and reducing the powers of the Superintendent and the Commissioner of Correctional Services to impose forfeitures of remission. Maximum periods of forfeiture would, it was proposed, be reduced from two months to one month where imposed by the Superintendent; and from six months to three months where imposed by the Commissioner. Another proposal under consideration was that the Secretary for Security should become an independent appellate body for prisoners aggrieved by decisions of the Commissioner of Correctional Services.

186. The Rules were so amended in 1997 31/ and now distinguish between offences committed in prisons that are of a criminal nature and those that are of a disciplinary nature. The former are now dealt with by the courts. The latter continue to be dealt with by the heads of penal institutions. The provisions in respect of forfeiture of remission have been modified as discussed above. And prisoners may now appeal to the Secretary for Security against forfeitures of remission exceeding one month ordered by the Commissioner.

187. In paragraph 131 of the previous report, we explained that rule 76 of the Prison Rules provided that any officer of the Correctional Services Department who, without lawful authority,

(a) Made any communication to any person whatsoever concerning a prison or prisoners, or

(b) Communicated to the public press information derived from official sources or connected with his duties or the prison

committed a breach of confidence and would be liable to dismissal.

188. To satisfy the requirements of BORO, and as foreshadowed in paragraph 131 of the previous report, we have deleted sub-rule 76 (b). We have also reworded rule 76 so that, now, the restrictions on the disclosure of information by an officer of the Correctional Services Department relate only to information that would affect prison security or interfere with prisoners' privacy. In addition, sub-rules 239 (1) (e) (i), (ii) and (iii), which made it a disciplinary offence for prison staff to divulge any information obtained in their official capacity without authority, have been revoked. As with rule 61, these proposals were given effect under the Prison (Amendment) Rules 1997.

Rehabilitation of offenders

189. The Rehabilitation of Offenders Ordinance (chap. 297) aims to help people who have committed minor offences to rehabilitate. When the Ordinance was first enacted (in 1986), it provided that where a person, on first conviction, was not sentenced to imprisonment or a fine exceeding $5,000 the conviction could be disregarded for most purposes 32/ after three years, so long as that person incurred no further conviction. In paragraph 134 of the previous report, we explained that amending legislation was being drafted to extend the range of sentences covered by this Ordinance. Accordingly, the Rehabilitation of Offenders (Amendment) Ordinance was enacted in 1996. The envisaged expansion was accomplished by raising the "fine ceiling" from $5,000 to $10,000 and by making the scheme available to first offenders imprisoned for terms not exceeding three months.

Rehabilitation of juvenile offenders

190. The Correctional Services Department provides rehabilitation programmes and aftercare services to help juvenile offenders reintegrate into the community after their release. These comprise education, vocational training, psychological services, character building, counselling, social skill training and welfare services. Different programmes and supervision schemes address the rehabilitative needs of offenders in various kinds of institutions. Aftercare services, which may include temporary residence in a half-way house, ease the transition from custody to freedom. They include supervision, job placement, guidance to strengthen confidence and programmes to help inmates to improve their relationships with their parents.

191. The Department currently runs four different correctional programmes for the care and rehabilitation of young offenders. These are described in annex 9.

The Community Service Support Scheme

192. As explained in paragraph 135 of the previous report, the Government and two NGOs introduced this scheme on a pilot basis in October 1994. It offered training and social rehabilitation programmes to certain categories of young offenders and delinquents. 33/ The scheme aimed to stimulate the interest of the "clients" in education (or in work) and to develop their social skills. The scheme provided intensive social group work programmes, counselling groups, job training, placement services, skill-learning classes, adventure

outdoor activities and programmes for parents. An independent evaluation, completed in late 1996, found that the scheme was proving effective. It is now operating on a permanent basis.

Rehabilitation: philosophy of "throughcare"

193. "Throughcare" entails constant care for all young offenders, from the time of their admission to a correctional institution and beyond the time of their discharge.

194. Education programmes for young offenders provide a suitable balance of general education and vocational training. A wide range of trades are offered, as are courses in technical and commercial subjects. Inmates are encouraged to participate in programmes that lead to external accreditation and qualifications that are recognized by employers. Recently completed research 34/ found that the present rehabilitation programmes were effective and that the response from young offenders was positive. The authors recommended some 30 measures to improve existing rehabilitation and aftercare services. Some of these are now in effect and we are taking action on others. Annex 10 describes the major recommendations and indicates the state of progress as at the date of drafting this report.

Supervision and aftercare services for young offenders

195. Upon release, inmates are subject to a period of statutory supervision. The length of supervision differs according to the ordinances under which the inmate is released and the provisions of the ordinance under which the programme itself has been established. Annex 9 sets out the position in relation to young offenders.

196. Aftercare services commence immediately upon the admission of an inmate into an institution. Inmates are assigned to the care of aftercare teams from the beginning of their sentences to the end of their period of supervision in the community. Aftercare officers regularly interview their "supervisees" in order to monitor their progress. "Supervisees" have access to assistance and support as and when necessary.

The Long-term Prison Sentences Review Board

197. The Long-term Prison Sentences Review Ordinance (chap. 524) was enacted in June 1997 to make the review system more transparent, open and fair. The Ordinance established the Long-term Prison Sentences Review Board (the Board), so replacing the former (non-statutory) advisory board. The Board reviews prisoners' cases and advises the Chief Executive on the exercise of his prerogative to pardon under article 48 (12) of the Basic Law. 35/ The Board is also empowered to make conditional release orders in respect of prisoners serving indeterminate sentences and to make supervision orders in respect of prisoners whose indeterminate sentences have been converted to determinate ones.

198. The Board consists of not more than 11 and not fewer than 8 members appointed by the Chief Executive. Two of the members appointed must be judges (or former judges) of the Court of First Instance and will be appointed

President and Deputy President of the Board. The other members are non-officials (persons unconnected with the administration or the judiciary) drawn from such disciplines as psychiatry, psychology, social work, education, industry/commerce, the law and the rehabilitation of offenders.

The Release Under Supervision Board (RUSB)

199. This Board was established in 1988 under the Prisoners (Release Under Supervision) Ordinance (chap. 325). It advises the Chief Executive as to whether eligible prisoners should be released before they have served their full terms in order to join the “Release under supervision scheme” or the “Pre-release employment scheme”, as respectively prescribed under sections 7 (1) and 7 (2) of the Ordinance.

200. RUSB consists of not less than five members appointed by the Chief Executive. It is chaired by a person appointed by the Chief Executive who holds, or has held, judicial office and includes non-official members with expertise or experience in psychiatry, or who take an active interest in the rehabilitation of offenders.

201. Section 7 of the Ordinance prescribes the conditions for eligibility under the two schemes. Essentially, they are open to all prisoners except those serving life sentences. Prisoners serving terms of three years or more become eligible for consideration when they have served either half of their sentences or 20 months, whichever is the greater. Those serving two years or more are eligible when they are within six months of the expiry of their sentences. Section 6 of the Ordinance provides that prisoners may apply not earlier than six months before they become eligible. The Ordinance requires RUSB to consider prisoners' applications and to make recommendations to the Chief Executive. Successful applicants are subject to supervision by the Correctional Services Department within a specified period.

The Post-Release Supervision Board (PRSB)

202. In paragraph 133 of the previous report, we indicated that, following the enactment of the Post-Release Supervision of Prisoners Ordinance (chap. 475) which, with its Regulations, came into operation in November 1996, the Government proposed implementing this scheme in recognition of ex-prisoners' post-adjustment needs. The aim was to provide assistance and guidance to help discharged adult prisoners reintegrate into the community and discourage them from re-offending. The Ordinance provides that PRSB may grant post-release supervision to adult prisoners serving sentences of six years or more and those sentenced to two years or more but less than six years for specific types of offences. 36/ The normal supervision period ranges from six months to two years. The supervision period cannot exceed the remitted part of a prisoner's sentence.

203. PRSB consists of at least eight members appointed by the Chief Executive. Two must be judges or former judges of the High Court or District Court and will be appointed as the Chairman and Deputy Chairman. Other members include representatives of the Correctional Services Department and the police, and non-officials with expertise or experience in such disciplines as psychiatry, psychology, criminal law and the rehabilitation of offenders.

Complaints against the Correctional Services Department

204. The investigation of such complaints falls to the Complaints Investigation Unit of the Correctional Services Department. Its findings are scrutinized by an (impartial) Case Review Committee.

205. All complainants - and those complained of, if any - are informed in writing of the outcome of the investigations of their complaints. Complainants aggrieved by these findings may seek re-examination by the Case Review Committee, with or without further supporting materials or fresh evidence, within 14 days of such notification.

Prisoners' rights of complaints and petition

206. Prisoners have the right to petition the Chief Executive, or to see visiting justices of the peace, about any matter regarding prison treatment. In addition, they can complain to senior officers of the Correctional Services Department, the Complaints Investigation Unit of the Department, the Ombudsman or Members of the Legislative Council. All prisoners are informed of these avenues of complaint through booklets, notices posted in institutions and interviews with officers of the Correctional Services Department.

Justices of the peace

207. The Justices of the Peace 37/ Visit Programme is an independent monitoring system that safeguards the rights and interests of the inmates/patients of prisons, welfare institutions and hospitals.

208. Under Part III of the Prison Rules, visiting justices of the peace (JPs) are required to visit prisons on a regular basis and report abuses to the Commissioner of Correctional Services. During their visits, they may speak to individual prisoners. The programme provides an effective independent channel for monitoring and improving the penal system. The views and suggestions put forward by the visiting JPs are carefully considered and, where appropriate, put into action. The Correctional Services Department will report to them on actions taken to address problems and complaints brought to their attention.

Complaints to the Ombudsman

209. Analysis of complaints that prisoners have made to the Ombudsman (see para. 210 below) indicates that most concern

Treatment by prison staff;

Welfare issues, including prison conditions or facilities, food and diet, mail handling, extra visits, access to telephones, access to medical services and standard of care;

Discipline, segregation, protection and control;

Prison transfer and labour allocation; and

Handling of complaints and access to visiting JPs and the Ombudsman.

210. To ensure that prisoners are aware of the Ombudsman's services and have ready access to his Office

On admission to penal institutions, prisoners receive leaflets informing them of the Ombudsman's services and how to have access to them;

On request, prisoners are given postage-free complaint forms issued by the Ombudsman's Office;

All penal institutions have dedicated notice boards and display posters informing prisoners of matters relating to the Ombudsman;

Procedures are in place to facilitate investigatory visits by the Ombudsman's Office; and

Correspondence between prisoners and the Ombudsman is promptly delivered. 38/

211. These measures have engendered a significant increase in the number of such complaints:

1994	22
1995	56
1996	205
1997	289
1998	185 (30 June)

Thus, the Ombudsman received over 500 complaints between 1994 and 1997. Nine were substantiated or partially substantiated.

212. In July 1998, the Ombudsman published a report on the Correctional Services Department's complaint system. This found that

The penal system placed increasing emphasis on correction and rehabilitation;

The Correctional Services Department's "vision, mission statement and values" had due regard to the interests and rights of inmates in its legal custody; and

The Department's internal complaint system was properly established and generally accessible. Its Complaints Investigation Unit provided an independent internal channel for complaints. The Unit's work was subject to the scrutiny of the Case Review Committee.

213. The report contained suggestions for improving the Correctional Services Department's complaint handling system. These included

Enhanced publicity of the internal complaint system;

Target response time for complaint handling; and

Improving staff training in complaints handling skills.

Some of these suggestions are being actively pursued. The Government is carefully considering the others.

Young offenders formerly detained “at Her Majesty's pleasure”

214. Currently, there are 15 prisoners who, before 1 July 1997 and when they were under the age of 18, committed murder and were sentenced to detention “at Her Majesty’s pleasure”, a term indicating detention of indeterminate duration. With effect from 1 July 1997, it was renamed “at executive discretion” under the Long-term Prison Sentences Review Ordinance (chap. 524), which establishes procedures and mechanisms for the review of all long-term sentences, including indeterminate ones. At the same time, a new section 67 C 39/ was added to the Criminal Procedure Ordinance (chap. 221). This provided for the determination of a minimum term in respect of prisoners serving discretionary sentences of life imprisonment who were detained “at executive discretion” on 1 July 1997.

215. Essentially, section 67 C requires that, after taking into account a prisoner's written representations, and within six months of the commencement of the Ordinance, the Chief Justice is to submit to the Chief Executive a recommendation on a “minimum term” that the prisoner should serve in relation to the offence for which he was detained. The Chief Executive is required to determine such minimum terms as soon as practicable after receiving the Chief Justice's recommendations and the prisoners' written representations to the Chief Executive. Once the minimum term is determined, the prisoner's case will be regularly reviewed by the Long-term Prison Sentences Review Board. As at the date of drafting this report, the Chief Executive had determined minimum terms for 14 of the 15 prisoners detained at executive discretion. The case of the fifteenth would be processed once his written submission to the Chief Executive was available.

Separation of young offenders from adults in penal institutions

216. As explained in paragraph 137 of the previous report, young offenders are kept apart from adults. Male and female young offenders are detained in separate institutions. Young offenders awaiting trial are separated from those who have been convicted (in different locations within the same institution 40/). In rare cases where security considerations necessitate the assignment of a young prisoner to an adult prison, that prisoner is detained separately from the adults.

Prisoners belonging to ethnic minorities

217. All prisoners are accorded the same treatment, irrespective of their race, nationality, culture or origin. But special dietary regimes are available for prisoners from different cultures. The religious needs of prisoners are also taken into consideration in the assignment of work. For example, prison rule 41 stipulates that Jewish prisoners shall not be compelled to work on Saturdays if they claim exemption. Prison rule 45

provides that Muslim prisoners shall be allowed to observe the fast of Ramadan. During the fast, their workload shall be reduced as the Medical Officer considers proper.

The conditions of "mental patient" inmates

218. Inmates suffering from mental disorders are placed in the Siu Lam Psychiatric Centre in the western New Territories. The Centre is a prison hospital and operates in accordance with both the Prisons Ordinance (chap. 234) and the Mental Health Ordinance (chap. 136). All prisoners who are fit to do so engage in occupational therapy in workshops managed by craft instructors and occupational therapists. Activities include rattan-work, tailoring, rug-making, laundry, pottery, sewing, carpentry, gardening and domestic services.

219. The Centre's Psychological Care Unit meets the needs of prisoners with limited intelligence who require special psycho-educational programmes to improve their self-sufficiency and to reduce their chances of reoffending. The Unit also provides counselling and psychological treatment for sexual offenders.

220. After serving 12 months' imprisonment, inmates detained under the Mental Health Ordinance, or their relatives, may seek review of their cases by the Mental Health Review Tribunal. Except where the first such review results in release, the Commissioner of Correctional Services shall refer the patient's case to the Tribunal for review on a yearly basis.

Prison overcrowding

221. In 1997, Hong Kong's penal institutions held an average of 15 per cent more prisoners than their certified capacity. Nevertheless, all facilities in such institutions conform with the relevant provisions in the Standard Minimum Rules for the Treatment of Prisoners. The Government has taken steps to address the problem, mainly through redevelopment of existing penal institutions. Several such projects have recently been completed or are under way. Together, they will provide over 1,700 additional places. We are also seeking possible sites for new prison facilities.

Article 11. No imprisonment for non-fulfilment of contract

222. Article 7 of BOR gives domestic effect to the provisions of article 11. Nobody may be imprisoned in the HKSAR merely for failure to fulfil a contractual obligation.

223. However, in certain cases, a judgement debtor may be sent to prison for wilful failure to comply with a judgement ordering the payment of a specified sum of money. In those circumstances, order 49 B of the Rules of the High Court (chap. 4, Subsidiary legislation) permits the High Court to examine the judgement debtor. If the court concludes that the debtor is able to satisfy the judgement, wholly or partly; or has disposed of assets with a view to avoiding satisfaction of the judgement, wholly or partly; or has wilfully

failed to make a full disclosure of his assets, liabilities, income and expenditure, the court may, at its discretion, order the imprisonment of the judgement debtor for a period not exceeding three months.

224. If the court concludes that the debtor is able or will be able to satisfy the judgement, wholly or partly, by instalments or otherwise, it may order him to satisfy the judgement in such manner as it thinks fit. However, if the debtor fails without good cause to comply with the court order, he may be imprisoned for a period not exceeding three months.

225. When a judgement debtor is committed to prison, the court must fix whatever monthly allowance it may think sufficient for his support and maintenance. That allowance may not exceed $660 per diem. This must be paid by the judgement creditor monthly in advance. All such sums are recoverable by the attachment and sale of the property of the judgement debtor.

226. The Government has not kept any statistics on the number of court orders made under the Rules of the High Court.

Article 12. Liberty of movement

Legal protections

227. At the constitutional level, article 31 of the Basic Law provides that Hong Kong residents shall have freedom of movement within the Region and freedom of emigration to other countries and regions. The rights prescribed in article 12 of the Covenant are further secured by article 39 of the Basic Law, which entrenches the provisions of the Covenant (and the International Covenant on Economic, Social and Cultural Rights) as applied to Hong Kong.

228. Additionally, as explained in paragraphs 141 and 142 of the previous report, article 8 of BOR gives domestic effect to the protections in article 12 of the Covenant.

229. Thus, in general, 41/ there are no constraints on how or where residents may live. The laws do not interfere with the right of persons to leave Hong Kong, except in the special circumstances explained in the previous report and rehearsed below. We believe that these restrictions, being provided by law, necessary and consistent with the other rights recognized in the Covenant, fall within the scope of the exceptions in article 12.3 and in article 8 (3) of BOR.

230. The circumstances in which the freedom of movement and the right to leave Hong Kong may be restricted are:

(a) Intent to evade payment of wages or other moneys owed under a contract of employment: if an employer or former employer is about to leave Hong Kong with such intent, section 67 of the Employment Ordinance (chap. 57) enables his employees to apply to a district judge for a warrant ordering that the employer be apprehended and brought before a district judge. Judges will only issue such warrants if they are satisfied that there is probable cause

for believing that an employer is about to leave Hong Kong with such intent. They may require such employers to enter bonds for their appearance in court until they have paid their employees the full amount owed to them;

(b) Non-payment of tax: section 77 of the Inland Revenue Ordinance (chap. 112) provides that a district judge may issue a departure prevention direction to restrain any person from leaving Hong Kong if he has not paid, or furnished security for payment of, any tax due from him. The direction is only issued if the judge is satisfied that there are reasonable grounds for believing that the person intends to depart and that it is in the public interest to issue the direction. The provision enables persons aggrieved by such directions to appeal to the Court of First Instance to set aside or suspend the directions, or dismiss the appeal;

(c) Investigation of a travel agent suspected of conducting business contrary to the public interest: where such a suspicion exists, section 21 of the Travel Agents Ordinance (chap. 218) empowers the Registrar of Travel Agents (the Registrar) to conduct an investigation into the business of a licensed travel agent so suspected. Section 29 of the Ordinance enables the Registrar to apply to a magistrate on an ex parte basis, by statement made on oath by the Registrar or an authorized officer, for a prohibition order to stop a person leaving Hong Kong. Before making such an order, the magistrate must be satisfied that the person to be stopped is in a position to assist the Registrar's investigation; that there are reasonable grounds for believing that the person intends to leave Hong Kong; and that it is in the public interest to prevent that person’s departure so that he can assist in the investigation of the travel agent. Persons aggrieved by such an order may appeal to the Court of First Instance under section 29 (10) of the Ordinance; and

(d) Persons under investigation for offences under the Prevention of Bribery Ordinance: section 17 A of the Prevention of Bribery Ordinance previously provided that magistrates might, upon the application ex parte of the Commissioner of ICAC, order persons who were under investigation in respect of offences “alleged or suspected” to have been committed by them to surrender their travel documents to the Commissioner. As foreshadowed in paragraph 146 of the previous report, it was necessary to amend the section by replacing the words “alleged or suspected” by “reasonably suspected” in order to bring the section into line with article 8 (2) of BOR and article 12 of the Covenant. This was effected in 1996 with the enactment of the Prevention of Bribery (Miscellaneous Provisions) Ordinance 1996.

Hong Kong travel documents

231. Article 154 of the Basic Law authorizes the HKSAR Government to issue HKSAR passports to all Chinese citizens who hold permanent identity cards of the Region (persons who hold such cards have the right of abode in Hong Kong). The Hong Kong Special Administrative Region Passports Ordinance (chap. 539) prescribes the detailed rules for the processing and issue of HKSAR passports.

Issue of HKSAR passports and statistics: Hong Kong Special Administrative Region Passports Ordinance

232. The Immigration Department is the sole authority for the processing and issue of HKSAR passports and for updating the related database. On average, it takes 15 working days to process a passport application. But urgent applications can be "fast-tracked". As at 30 June 1998, the Department had issued about 600,000 HKSAR passports.

Number of countries offering visa-free entry to visitors from the HKSAR

233. The Committee has previously been informed 42/ that as at June 1997 the United Kingdom and 18 other countries had announced their intention to grant visa-free entry to visitors holding HKSAR passports. As at 30 June 1998, 50 countries/territories had granted this. Several other countries, including the United States of America, Germany, Italy and Japan, grant multiple-entry visas of extended validity to such visitors. The Government will continue its efforts to secure greater travel convenience for Hong Kong residents.

234. Article 154 of the Basic Law also empowers the HKSAR Government to issue travel documents "to all other persons lawfully residing in the Region". Non-permanent residents who do not have any other travel document may be issued with a "document of identity for visa purposes". The document is issued by the Director of Immigration under the Immigration Regulations (chap. 115, Subsidiary legislation). They are valid for seven years and normally have an endorsement stating that "the holder of this document may return to Hong Kong during its validity without a visa".

Right of abode

235. Article 24 of the Basic Law provides that permanent residents of the HKSAR shall have the right of abode in the HKSAR and be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode. Article 24 also states that permanent residents of the HKSAR shall be:

(i) Chinese citizens 43/ born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;

(ii) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;

(iii) Persons of Chinese nationality born outside Hong Kong to residents listed in categories (i) and (ii);

(iv) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(v) Persons under 21 years of age born in Hong Kong to residents listed in category (iv) before or after the establishment of the Hong Kong Special Administrative Region; and

(vi) Persons other than residents listed in categories (i) to (v), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

236. Article 24 is silent as to how persons who qualify as permanent residents are to establish that status. To meet that need, the Immigration (Amendment) (No. 2) Ordinance (the "No. 2 Ordinance"), enacted on 1 July 1997, replaced the previous provisions of the Immigration Ordinance on permanent residency, clarified other provisions of article 24 and introduced provisions for establishing that right in respect of claims under article 24 (4), (5) and (6). It also provided for the circumstances in which persons lose that right and for the retention by such persons of a right to land in Hong Kong.

237. Under the No. 2 Ordinance, persons in categories (iv) and (v) may forfeit the right of abode if they are absent from Hong Kong continuously for 36 months. Those in category (vi) may lose it if they are absent from Hong Kong for 36 months after acquiring the right of abode elsewhere. 44/ Permanent residents who left Hong Kong before 1 July 1997 and have obtained foreign nationality may retain the right of abode in the HKSAR. There is no need for them to return to Hong Kong in order to do so. Should they return to Hong Kong and wish to remain there, those who are ethnically Chinese will normally be regarded as Chinese nationals and will automatically retain their right of abode. But they may, at their option, remain in Hong Kong as foreign nationals and, subject to certain conditions, 45/ retain the right of abode. Essentially, they need only declare their new nationality to the Immigration Department. There are certain exceptions (related to when the applicant left Hong Kong, how long he/she was away, and when he/she makes the declaration to the Immigration Department) that might prevent an applicant from retaining the right of abode. But persons so affected will still be free to enter Hong Kong without restriction for residence, study and work.

Certificate of Entitlement (C of E) Scheme

238. Before 1 July 1997, persons covered by article 24 (3) of the Basic Law were not entitled to the right of abode in Hong Kong. The Basic Law is silent on the procedures by which persons may establish their entitlement to the right of abode in the HKSAR. The Immigration (Amendment) (No. 3) Ordinance (the "No. 3 Ordinance") was enacted on 10 July 1997, with effect from 1 July 1997, to provide such procedures. This Ordinance, which introduced the C of E scheme, provides that a person's status as a permanent resident of the HKSAR under article 24 (3) of the Basic Law can only be established by his/her holding, amongst other things, a valid travel document with a valid C of E affixed to it. In this connection, persons who were born in mainland China to Hong Kong residents and claim that they have the right of abode in the HKSAR have to apply for a valid travel document and C of E before being admitted to Hong Kong. This arrangement ensures that those who claim that they have the right of abode in the HKSAR under article 24 (3) of the Basic Law have that claim verified before entering the HKSAR. As at 30 June 1998, the scheme had ensured the speedy and orderly admission of about 25,000 eligible children.

Legal challenges to the No. 2 and No. 3 Ordinances

(a) Cheung Lai-wah v. Director of Immigration

239. Following the enactment of the No. 3 Ordinance, parents of over 1,000 children born in mainland China applied for legal aid to challenge the C of E scheme's consistency with the Basic Law. Legal aid was granted to enable four test cases to be judicially reviewed. Cheung Lai-wah, the applicant in one of the four test cases, is a child born out of wedlock to a father who is a permanent resident in Hong Kong and a mother who was resident in mainland China. The applicant entered Hong Kong before the two Ordinances took effect on 1 July 1997. In October 1997, the Court of First Instance affirmed the legality of the C of E scheme and its consistency with the Basic Law. The court also held the retrospectivity of the No. 3 Ordinance to be lawful. It rejected the argument, advanced on behalf of the applicants, that any person who claims the right of abode is entitled to enter and/or remain in the HKSAR pending the determination of his claim. The court also ruled that children born out of wedlock outside Hong Kong to fathers who were permanent residents in Hong Kong were eligible for the right of abode under article 24 of the Basic Law irrespective of the status of their mothers, and that the provision on illegitimacy in the No. 2 Ordinance, 46/ was unconstitutional.

240. The Government and the applicants in the four test cases appealed against these rulings. In April 1998, the Court of Appeal upheld the legality of the C of E scheme and its retroactivity to 1 July 1997. But it held that the C of E scheme did not apply to persons who were in the HKSAR and came to Hong Kong before 1 July 1997. The illegitimacy provision was again ruled unconstitutional.

241. The applicants had also challenged the legality of the Provisional Legislative Council and thus of the No. 2 and No. 3 Ordinances that it had passed. The Court of Appeal addressed that issue in May 1998, affirming the Council's legality.

(b) Chan Kam-nga v. Director of Immigration

242. The Immigration No. 2 Ordinance stipulates, amongst other things, that in order for a child of Chinese nationality born outside Hong Kong to a parent who is a permanent resident of the HKSAR to qualify for the right of abode, one of his or her parents must be a Chinese citizen and have acquired the right of abode at the time of the child's birth. The parents of 81 children who were born in mainland China before either of their parents had acquired the right of abode in Hong Kong have applied for judicial review. They contend that the No. 2 Ordinance is inconsistent with article 24 (3) of the Basic Law, which does not specify that a parent must be a permanent resident at the time of a child's birth to acquire the right of abode. They also contend that the C of E scheme is inconsistent with article 24 of the Covenant in that the scheme has the practical effect of separating the mainland children in question from their parents and siblings.

243. Chan Kam-nga is one of the 81 children. Her case, which is the representative case for the group, was heard before the Court of First Instance in January 1998. The Court held that the provision under challenge was unconstitutional. The Government appealed and in May 1998 the Court of Appeal reversed that decision, ruling that the provision was consistent with the Basic Law.

244. All parties to these cases have appealed against those decisions of the Court of Appeal that were not in their favour. The Court of Final Appeal will hear the appeals in January 1999. In the meantime, pending the conclusion of the court proceedings, no one involved in those proceedings whose right to remain in Hong Kong is affected by the Ordinances will be removed from the HKSAR.

245. Several commentators have expressed the view that the No. 3 Ordinance 1997 contravenes article 158 of the Sino-British Joint Declaration, article 24 (3) of the Basic Law, articles 12 (4) and 15 (1) of the Covenant and articles 8 (4) and 12 of BOR. The Government considers that the allegation is without foundation. The C of E scheme does not deprive individuals of their rights. It merely aims to ensure that persons claiming that they have the right of abode under article 24 (3) of the Basic Law have that claim verified before entering the HKSAR.

246. Commentators have also said that the Immigration (Amendment) (No. 2) Ordinance 1997 exacerbates the existing problem of split families. The Government does not accept that view. The provisions of the Ordinance do not require family members to live apart from one another. If families do live apart it is because they have chosen to do so and not because of the Ordinance. Hong Kong permanent residents have the right to leave Hong Kong and to join their families in mainland China.

Lawful entry into Hong Kong

247. Hong Kong maintains its traditionally liberal visa policy. Nationals from some 170 countries and territories can visit Hong Kong visa-free for periods of between seven days and six months. A dedicated immigration unit handles applications from visitors who do need visas to visit Hong Kong. Most (about 74 per cent) of such applications are finalized within four to six weeks after receipt.

Changes to the status of British citizens

248. British citizens in Hong Kong used to have special immigration status, reflecting the constitutional relationship between Hong Kong and the United Kingdom. They were granted visa-free access for 12 months on arrival and could work, study or live in Hong Kong without the need to apply for visas. Those who had been ordinarily resident in Hong Kong for a continuous period of seven years acquired the “right to land”, a status similar to permanent residence but without the right not to be deported.

249. The status of United Kingdom citizens is now no different from that of other foreign nationals. They can visit Hong Kong without visas for up to six months. But they must apply for visas to work, study or live in Hong Kong.

Those who entered Hong Kong before April 1997 were permitted to remain until their current limits of stay expired. If they wished to remain after that, they had to apply for extensions. Like other foreign nationals, those who have been ordinarily resident in Hong Kong for seven years can apply for permanent resident status.

Assistance for Hong Kong residents in mainland China

250. The Immigration Department provides certain forms of assistance to Hong Kong residents who, while in mainland China, lose their travel documents, are detained or imprisoned. In essence, such assistance is provided in cases of

Loss of travel documents: the Department will make prior arrangements with the appropriate control points (border posts, airport control centres); and

Detention or imprisonment: if Hong Kong residents are detained by the mainland authorities on criminal charges, the Hong Kong Police Force will ascertain their whereabouts and the reason for their detention. If a Hong Kong resident has been unlawfully detained by people other than the mainland authorities, the Hong Kong police will request the National Central Bureau (NCB) of Interpol China to take such action as may be necessary to free them. Where necessary, the Hong Kong police will provide background information and criminal intelligence to NCB.

Article 13. Restrictions on expulsion from Hong Kong

Legal position

251. Article 9 of BOR gives domestic effect to the protections in article 13. At the same time, section 12 of BORO (exceptions and savings) makes it clear that article 9 does not confer a right of review in respect of a decision to deport a person not having a right of abode in Hong Kong or a right to be represented for this purpose before the competent authority. This is consistent with the reservation made to article 13 when the Covenant was extended to Hong Kong.

Powers of removal and deportation under the Immigration Ordinance

252. The position is much as described in paragraphs 153 to 158 of the previous report. That is:

(a) Persons who enjoy the right of abode in Hong Kong cannot be deported or removed from Hong Kong;

(b) Immigrants may be deported by order of the Chief Executive, but only if they have been convicted of an offence punishable with imprisonment for not less than two years or if the Chief Executive deems their deportation to be conducive to the public good. Deportees have a statutory right to have their cases reviewed by the Chief Executive in Council. Any person may make representations to the Chief Executive before a deportation order is made and

can appeal to the Chief Executive after the order has been issued. Any person may petition the Chief Executive for the suspension or rescission of a deportation order in force;

(c) Immigrants who have not been ordinarily resident in Hong Kong for three years or more may be required by the Chief Executive, by way of a removal order, to leave Hong Kong if the Chief Executive considers them to be undesirable. By way of removal orders, the Director of Immigration may require persons to leave Hong Kong if they have remained without permission, or if they have committed certain prescribed offences, or if they have been refused permission to land. There is a right of review in these cases. Any person may also petition the Chief Executive in respect of such a removal order;

(d) Deportation orders prohibit the persons concerned from returning to Hong Kong either for life or for the period specified in the particular order. It is an offence to return to Hong Kong in breach of a deportation order;

(e) Removal orders are less permanent in effect than those for deportation. They do not prohibit the persons concerned from returning to Hong Kong after their orders have been executed;

(f) As explained in paragraph 157 of the previous report, the power to deport or remove has been used sparingly and on justifiable grounds. See paragraphs 256 and 261 below.

(g) Prior notice is given to immigrants serving prison terms who are to be deported after their release, to allow them to prepare themselves for return to their own countries. Other immigrants subject to removal orders are normally given between one and seven days' notice to allow them to prepare for the return. In every case, prior agreement with the country accepting the deportee or removee is sought.

253. The processes whereby these principles are implemented are explained in the following paragraphs.

Deportation

254. Under section 20 of the Immigration Ordinance (chap. 115), the Chief Executive of the HKSAR may make a deportation order against an immigrant if the immigrant has been found guilty in Hong Kong of an offence punishable with imprisonment for not less than two years, or if the Chief Executive of the HKSAR deems it to be conducive to the public good. A deportation order requires the person concerned to leave Hong Kong and prohibits him from returning to Hong Kong at any time thereafter or during a period specified in the order. The Chief Executive of the HKSAR has delegated the power to make deportation orders to the Secretary for Security.

255. Applications for deportation orders are made by the Director of Immigration. Before applying to the Secretary for Security for a deportation order against an immigrant, the Director will notify the immigrant of his intention to seek his deportation and invite him to make representations

against the deportation. The grounds, if any, put forth by the immigrant, together with the Director's comments and recommendation, will be forwarded to the Secretary for Security for a decision as to whether a deportation order should be made.

256. An immigrant against whom a deportation order has been made may lodge an objection to the decision with the Chief Secretary for Administration within 14 days. Under section 53 of the Immigration Ordinance, the objection will be considered by the Chief Executive in Council. Alternatively, he may make a petition to the Chief Executive under article 48 of the Basic Law for the suspension or rescission of the deportation order.

Year	Number of deportation orders issued a/	Number of petitions against deportation orders	Number of petitions against deportation orders which have been allowed	Number of deportation orders rescinded or suspended
1991-1994	1 385	13	0	33
1995-June 1997	1 670	40	0	18
July 1997-June 1998	759	26	0	4

a/ All the deportation orders were issued after the persons concerned had been found guilty of an offence punishable with imprisonment for not less than two years and none were issued on the ground that the deportation would be conducive to the public good.

Removal

257. Under section 19 of the Immigration Ordinance, the Director, Deputy Director or an Assistant Director of Immigration may make a removal order against a person who does not enjoy the right of abode in Hong Kong, or who does not have the Director's permission to remain in Hong Kong.

258. A person against whom a removal order has been made may appeal to the Immigration Tribunal within 24 hours against the order. The operation of the Tribunal is explained in the following section.

259. Alternatively, a person against whom a removal order has been made may petition the Chief Executive of the HKSAR against the order under article 48 of the Basic Law.

Year	Number of removal orders issued	Number of statutory appeals received (allowed) against removal orders
1991-1994	13 918	1 007 (89)
1995-June 1997	5 089	2 083 (7)
July 1997-June 1998	1 531	1 260 (2)

Immigration Tribunal

260. The Immigration Tribunal is established under section 53 F of the Immigration Ordinance to hear and determine appeals against removal orders made by the Director of Immigration, the Deputy Director of Immigration or an Assistant Director of Immigration.

261. For the purpose of exercising the jurisdiction of the Tribunal, the Chief Executive has appointed a Chief Adjudicator, a Deputy Chief Adjudicator and a number of Adjudicators. The Chief Adjudicator and the Deputy Chief Adjudicator are retired judges of the High Court and District Court respectively. The Adjudicators are from various sectors of the community. Any two Adjudicators, including the Chief Adjudicator or Deputy Chief Adjudicator, constitute a Tribunal. The Tribunal determines an appeal on the facts of the case. If the Tribunal finds that the appellant does not enjoy the right of abode in Hong Kong and does not have the permission of the Director of Immigration to remain in Hong Kong, it must dismiss the appeal; and in any other case, it must allow the appeal. The Tribunal shall allow an appeal if either Adjudicator hearing the appeal considers that the appeal should be allowed. Under section 53 D of the Immigration Ordinance, the decision of the Tribunal is final.

Article 14. Equality before the courts and right to a fair and public hearing

Legal position

262. The provisions of article 14 are given direct effect in domestic law through articles 10 and 11 of BOR. At the constitutional level

> Article 35 of the Basic Law guarantees “the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of lawful rights and interests or for representation in the courts, and to judicial remedies”. It also guarantees “the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel”;

Article 85 of the Basic Law guarantees the independence of the judiciary;

Article 86 guarantees the continuance of trial by jury;

Article 87 guarantees the right to fair trial without delay and the presumption of innocence; and

Article 89 guarantees judges' security of tenure.

Independence of the judiciary

263. Section 4, chapter IV of the Basic Law (arts. 80-96) establishes the constitutional framework for Hong Kong's judiciary. See paragraphs 90 to 95 of the revised core document of China.

Appointment of judges

264. Article 88 of the Basic Law provides that judges are to be appointed by the Chief Executive in accordance with the recommendations of an independent commission. The Judicial Officers Recommendation Commission ("the Commission") has been established for that purpose. The Commission is chaired by the Chief Justice. Its membership is composed in equal proportions of judges, lawyers and eminent individuals unconnected with the law.

265. The Commission is a statutory organization. Section 6 of the Judicial Officers Recommendation Commission Ordinance (chap. 92) states that its functions are to advise or make recommendations to the Chief Executive regarding

(a) The filling of vacancies in judicial offices;

(b) Such representations from a judicial officer concerning conditions of service as may be referred to it by the Chief Executive; and

(c) Any matter affecting judicial officers which may be prescribed or which the Chief Executive may refer to the Commission.

266. Article 92 of the Basic Law provides that judges and other members of the judiciary of the HKSAR "shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions". Candidates for judicial appointment are assessed on the basis of their professional competence in the law, judicial temperament and personal conduct. Appointments to the District Court and below are through open recruitment. Vacancies are advertised in newspapers and notified to both branches of the legal profession and the Government's legal group of departments. There is no formal advertisement of vacancies in the High Court and above. Only professionals of the highest standing are considered for appointment and such persons are generally well known to the profession, the judiciary and members of the Commission.

267. Section 9 of the Judicial Officers Recommendation Commission Ordinance provides that any report, statement or communication made by the Commission in

the discharge of its duties is privileged in that its production may not be compelled in any legal proceedings. Members of the Commission enjoy the same privileges and protections in proceedings brought against them as do judges when acting in the execution of their office. It is an offence, punishable by imprisonment, to provide false information or to influence or attempt to influence a decision of the Commission or any of its members.

268. Article 90 of the Basic Law provides that, when proposing to appoint persons as judges of the Court of Final Appeal or the Chief Judge of the High Court (or to remove them from those positions), the Chief Executive shall obtain the endorsement of the Legislative Council and report such appointment or removal to the Standing Committee of the National People's Congress for the record. This article seeks to confer on the legislature a residual power of veto to ensure that the independence of the judiciary is maintained and that the Basic Law process regarding judicial appointments has been followed.

Tenure, retirement and removal from office

269. Under the law, judges enjoy security of tenure and shall only vacate their office when they attain the retirement age of 65. Article 89 of the Basic Law provides that judges may only be removed from office for inability to discharge their duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

Court of Final Appeal

270. Article 19 of the Basic Law provides that the Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

271. The Court of Final Appeal was established on 1 July 1997. It is the highest appellate Court in Hong Kong and has jurisdiction in respect of matters conferred on it by the Hong Kong Court of Final Appeal Ordinance (chap. 484) (CFA Ordinance) and by any other law, other than acts of State such as defence and foreign affairs. It hears appeals on civil and criminal matters from the High Court (that is, the Court of Appeal and the Court of First Instance). The powers of the Court of Final Appeal are set out in the CFA Ordinance. It may confirm, reverse or vary the decision of the court from which the appeal lies or may remit the matter with its opinion to that court, or may make such other order in the matter as it thinks fit.

272. The composition of the Court of Final Appeal is prescribed in section 5 of the CFA Ordinance. It comprises the Chief Justice and three permanent judges. In hearing and determining appeals, the Court may, as required, invite a non-permanent Hong Kong judge or a judge from another common law jurisdiction to sit on the Court.

273. In addition to the Chief Justice and the three permanent judges of the Court of Final Appeal, there are also 11 non-permanent Hong Kong judges and 6 judges from other common law jurisdictions. Of the six judges from other common law jurisdictions, two are serving British Law Lords, Lord Nicholls of Birkenhead and Lord Hoffmann; two are Australia's former

Chief Justice of the High Court, Sir Anthony Mason and former High Court Judge, Sir Daryl Dawson; and two are New Zealand's retired President of the Court of Appeal, Lord Cooke who now sits in the British House of Lords and the Privy Council, and a retired judge of the Court of Appeal, Sir Edward Somers.

274. Section 13 of the CFA Ordinance provides that a person who has been appointed as the Chief Justice, a permanent judge or a non-permanent judge of the Court of Final Appeal shall not be entitled to practise as a barrister or solicitor in Hong Kong either while he holds office as such a judge or at any time after he ceases to hold office. High Court and District Court judges give an undertaking on their appointment not to revert to private practice.

275. Since its establishment, the Court of Final Appeal has received 29 applications for leave to appeal (18 criminal; 11 civil) and 14 substantive appeals (2 criminal; 12 civil).

"Acts of State"

276. In paragraph 14 of its concluding observations on the previous report, the Committee expressed concern that under the CFA Ordinance, the jurisdiction of the Court would "not extend to reviewing undefined acts of State by the executive". The Committee was concerned that "vague terminology such as acts of State might be interpreted so as to impose undue restrictions on the jurisdiction of the Court, including the application of any emergency laws that might be enacted in the future".

277. The Committee's concern related to section 4 (2) of the Ordinance. This restates the wording of article 19 of the Basic Law, which stipulates that the courts of the HKSAR shall not have jurisdiction over acts of State such as defence and foreign affairs. These provisions reflect the common law principle that, while the courts have no jurisdiction over acts of State, it is for the courts to decide whether or not a particular act was an act of State. This principle would apply to the question as to whether a response to an emergency, including an order under article 18 of the Basic Law, amounted to such an act.

278. The application of emergency law under article 18 of the Basic Law is subject to the limits on emergency powers imposed by the Covenant which is entrenched through article 39 of the Basic Law. Thus, in accordance with article 4 of the Covenant, the existence of a public emergency must be officially proclaimed. Measures may only be taken derogating from the rights in the Covenant to the extent strictly required by the exigencies of the situation and in accordance with the prohibitions on derogation in article 4.2.

Use of Chinese in the courts

279. All legal restrictions on the use of Chinese in the District Court and the courts above were lifted before 1 July 1997. Both Chinese and English are official languages for filing and conducting proceedings. In civil proceedings, parties may issue writs, file defences or notices of appeal in either of the official languages. Charge sheets served on the accused in criminal proceedings are in both official languages. The prosecution is

obliged, on request, to give persons accused of crimes translations of documents served on them. Defendants, parties and witnesses are free to use any language they choose before the court. Where a defendant or party is not conversant in the official language in which the trial is conducted, interpretation services are provided free of charge by the court.

Bilingual charge forms

280. In paragraph 12 of its concluding observations on the previous report, the Committee noted with concern that official charge forms and charge sheets, as well as court documents, were in English only, though efforts were being made to make Chinese versions available. In paragraph 9 (b) of the supplementary report, we explained that bilingual sheets were in use in the magistrates' courts, the District Court and the High Court. The experimental forms used in the police pilot scheme (described in paras. 170-171 of the previous report) were in use throughout the Police Force. But, as at May 1996, those forms were not yet fully bilingual because authentic Chinese versions were not available for all the relevant ordinances. As an interim measure, the police were using a bilingual glossary of terms commonly used for laying charges. 47/

281. Since then, the translation process has steadily progressed. As at 30 June 1998, the forms carried an authenticated Chinese version of about 70 per cent of all charges, these being the ones most commonly used. We expect to complete the exercise by June 1999.

Right to be tried without undue delay

282. In paragraphs 178 and 179 of the previous report, we explained that the growing volume and complexity of cases before the courts had resulted in unacceptably long waiting times. To speed up the disposal of cases, the judiciary had created additional judicial posts and maintained special court lists 48/ for specific areas of litigation (such as construction and arbitration, commercial matters, personal injuries).

283. Since the previous report, new special lists have been created to reduce the waiting times for cases in other areas. These include discrete lists to deal with cases brought under the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance. And the Administrative Law List, established in 1997, handles applications for judicial review, habeas corpus, election petitions, appeals from decisions of the Obscene Articles Tribunal and civil cases that raise issues under BORO and that have been certified by a judge as suitable for transfer to the list.

284. Resources have been secured for the creation of five additional courts to handle cases involving the Bill of Rights and equal opportunities. The judiciary has been closely monitoring the waiting times and caseloads of the relevant court lists with a view to creating the additional courts once the caseload so justifies.

285. Additionally, the judiciary has introduced digital audio recording and transcription services in all courts and has improved the management of court services. These measures have helped to reduce court waiting times to reasonable levels.

Right of access to the legal system

Legal aid

286. As explained in the revised core document of China (paras. 105-107), publicly-funded legal aid services are provided by the Legal Aid Department and the Duty Lawyer Service. The Legal Aid Department provides legal aid in the form of legal representation in all criminal, and most 49/ civil, cases heard in courts at the district court level and above. Applicants in civil cases are subject to a means test and a merit test. In criminal cases, in line with subsection 3 (d) of this article, only the means test normally applies, though the merit test applies to criminal appeals. All successful applicants must contribute a small part of their financial resources towards the cost of the services they obtain, if they can afford to do so.

287. Applicants who qualify under the means test (and the merit test if applicable) are granted legal aid, regardless of their social status, religious background, political beliefs or residency or other status. Some commentators have expressed concern that legal aid is unavailable for immigration-related offences. This concern is unfounded: legal aid is not subject to any restrictions on the ground of residency or origin. Indeed, the lack of such restrictions has itself been the focus of concern on the part of Hong Kong residents. The government position is that any such restrictions would be inconsistent with subsection 1 of this article (read in conjunction with article 2.1).

The supplementary legal aid scheme

288. This scheme benefits persons who are financially better off than those who qualify for standard legal aid, but not sufficiently to meet the cost of personal injuries litigation. The scheme covers such proceedings as suits for damages arising from deaths or personal injuries; employee compensation claims; and claims arising from professional negligence by medical doctors, dentists or lawyers. Successful litigants who have benefited under the supplementary scheme must contribute 15 per cent of the damages so recovered. Such contributions are added to the fund that pays for the scheme.

289. In 1997, the Legal Aid Department received about 30,000 applications for legal aid. The annual expenditure for the Department is about HK$ 870 million.

290. The Director of Legal Aid is required by law to consider all applications for legal aid in accordance with detailed legislative provisions. Persons aggrieved by the Director’s decisions, including decisions to refuse legal aid, may appeal to the Registrar of the High Court or, in relation to appeals to the Court of Final Appeal, to an independent committee comprised of representatives of the legal profession and the judiciary. This ensures that there is an independent check on the Director’s exercise of statutory powers.

Areas of public concern

291. Some commentators have said that, in refusing legal aid to defendants in complex commercial crime cases, the Director of Legal Aid failed to "place the interest of justice in the forefront" (sic). The comment refers to the discretionary power, available to the Director of Legal Aid in relation to criminal proceedings, to grant legal aid to applicants whose financial means exceed the normal financial eligibility limit. The discretion may be exercised if the Director is satisfied that it is in the interests of justice to do so. Where the discretion is exercised, the applicants must pay a prescribed contribution determined in accordance with statutory provisions.

292. The Court 50/ held that the question of the Director of Legal Aid exercising discretion to grant legal aid did not arise until he was satisfied as to the full extent of the financial resources of the applicants. This decision was affirmed by the Court of Appeal.

293. Commentators have also said that the interests of justice were not served when, in the first legally aided case heard before the Court of Appeal of the High Court of Hong Kong after 1 July 1997, 51/ the defence counsel was not instructed to argue the case on the issue of the legality of the Provisional Legislative Council. Counsel was not so instructed because the defendants who first raised the issue in the lower court did not seek legal aid to pursue the issue before the Court of Appeal and the only legally aided defendant in the case decided not to press the issue after consulting senior counsel. The question of the legality of the Provisional Legislative Council was recently reopened in an appeal involving the right of abode of children born in mainland China. 52/ The appellants were granted legal aid as they were in the lower court. The difference in approach in the second case was based partly on the advice of counsel and partly on the instructions of the legally aided persons concerned.

Duty lawyer service

294. This is explained in paragraph 107 of the revised core document of China. As stated there, the Service comprises the

(a) Duty lawyer scheme, which assists defendants in cases before the magistrates' courts. Applicants are subject to a simple means test and, if their applications are approved, are required to pay a nominal handling fee. The administrator of the duty lawyer service has the discretion to waive the means test in deserving cases and the handling fee if aided persons are unable to afford it;

(b) Legal advice scheme, which provides free legal advice on an appointment basis. Anyone who wishes to consult a volunteer lawyer can make an appointment through one of the several referral agencies, such as social welfare agencies and the Government's district offices; and

(c) "Tel-law scheme", which provides taped information on a variety of legal topics of general interest to the public.

295. In 1997, the government subvention totalled HK$ 90 million. Over 35,000 defendants were represented under the duty lawyer scheme. The legal advice service handled over 5,000 cases. And there were over 115,000 approaches to the tel-law service.

296. The Government recently completed a review of legal aid policy. This focused on the criteria for assessing applicants' financial eligibility, the extension of legal aid to coroners' inquests and the operation of the existing legal aid legislation. A key recommendation of the review was to improve the formula for calculating the disposable income of legal aid applicants when assessing their financial eligibility. Under the proposed formula, it is estimated that up to 8 per cent more of Hong Kong households will become financially eligible for legal aid. Public views were sought on the recommendations. These are summarized in annex 12. The response was generally positive. The Government is now considering the suggestions made by the public and the Legal Aid Services Council and will implement the improvement measures after the necessary legislative amendments have been made.

Legal Aid Services Council

297. The Council was established in 1996 to advise the Government on legal aid policy and to oversee (but not manage) the administration of legal aid services by the Legal Aid Department. 53/ As a statutory body, the Council is independent of the Government. It is chaired by a person who is independent of both the Government and the legal profession. Its members include lawyers and distinguished lay persons. The Director of Legal Aid is an ex officio member.

298. In paragraph 16 of its concluding observations on the previous report, the Committee expressed concern that applications for legal aid in Hong Kong were refused "in a large number of BOR cases directed against the Government or public officers". We are unsure how this concern arose. The Legal Aid Department frequently provides legal aid to persons challenging government policies or decisions. In 1997 alone, over 4,000 legal aid certificates were granted to Vietnamese migrants and mainland-born children. All were granted for the purpose of seeking judicial review proceedings against the Government.

299. Nevertheless, the Government is determined that the legal aid system should be and is seen to be impartial, fair and independent. It has been suggested that these objectives would be best served by setting up an independent legal aid authority. With these things in mind, the Government has commissioned the Council to examine the desirability and feasibility of establishing such a body. The Council has engaged international consultants to undertake the study. The consultants have examined the legal aid systems in England and Wales, New Zealand, Australia and Canada. They have also examined the costs and benefits of establishing such an authority, its possible powers and composition. The Legal Aid Services Council is now considering the consultants' recommendations with a view to tendering its advice to the Government in August 1998.

Access to the laws: financial aid for child applicants

300. The Legal Aid (Assessment of Resources and Contributions) Regulations (subsidiary legislation made under the Legal Aid Ordinance) provide that when an applicant for legal aid is an "infant" (defined in the Legal Aid Ordinance as an unmarried person under the age of 18) the financial resources of his parents or guardians will not be treated as the applicant's financial resources. In the case of adults, the financial resources of an applicant's spouse are normally treated as the applicant's own financial resources. This rule does not apply if the spouse has a contrary interest in the dispute in respect of which the application is made, or if the applicant and his/her spouse are living separate and apart. Some commentators consider these differences of treatment to be inequitable.

301. The Government's position is that, consistent with the principle in article 3.1 of the Convention on the Rights of the Child, the best interests of the child should be paramount. We believe that the current practice in relation to infant applicants is consistent with that principle. If the financial resources of the parents or guardians were treated as an infant applicant's own, many parents or guardians might be unable (or unwilling) to pursue cases on behalf of such applicants, since they would be required to contribute to the costs of so doing. And if they did pursue a case and were successful they could be out of pocket, as any damages recovered for or on behalf of the infant would be paid or otherwise dealt with in accordance with the directions of the court for the benefit of the infant.

Article 15. No retrospective criminal offences or penalties

302. Article 12 of BOR gives domestic effect to the provisions of article 15.

No retrospective offences

303. In paragraphs 238 and 239 above (in relation to article 12), we explained the retrospective effect of the Immigration (Amendment) (No. 3) Ordinance 1997 on the right of abode. That, of course, relates to the acquisition of a right, not to the commission of a criminal offence. Nevertheless, the legality of the "retrospective provision" in that ordinance was challenged in the case of Cheung Lai Wah v. Director of Immigration (CACV 203/1997). The argument adduced in litigation was that some persons "caught" by the retrospective effect of the provision might be exposed to criminal prosecution in consequence. Therefore, it was argued, the provision was inconsistent with article 12 of BOR. Two of the three judges of the Court of Appeal held that the provision was valid. In construing the meaning of article 12 of BOR, the Court held that the necessity from time to time to make retrospective legislation should not be absolutely prohibited simply because persons could, in consequence, be liable to prosecution under other ordinances. Rather, the court ruled, any such persons should have immunity from prosecution.

Benefit of lighter sentence under the new legislation

304. In paragraph 195 of the previous report, we explained that the Court of Appeal had developed two different approaches to the interpretation of

article 12 (1) of BOR (which corresponds to subparagraph 1 of article 15) in respect of cases where two new offences were created to replace an old offence, with one carrying a heavier penalty and the other a lighter one. In R v. Faisal [1993] 3 HKPLR 220, the Court of Appeal looked to the form of the old and the new offences. However, the Court of Appeal refused to follow R v. Faisal in R v. Chan Chi Hung [1993] 3 HKPLR 243. Rather, it considered it necessary to have regard to the underlying facts. In May 1995, as explained in the previous report, the Privy Council of the United Kingdom heard an appeal by the unsuccessful appellant in R v. Chan Chi Hung. At the time of submitting the previous report, the Privy Council had reserved its decision. It delivered that decision on 26 July 1995.

305. The Privy Council took the view that, given that the focus of article 12 of BOR was on what the defendant actually did, the question was how the defendant would have stood if he had been convicted and sentenced for what he did under the new law rather than the old. The Council considered the range of sentences that might have been imposed if the appellant had been convicted and sentenced under the new law on the day he committed the offences. It determined that the new law offered two alternative choices of offence, the choice depending upon the intention of the offender. On the agreed facts, it was plain that the offender should be convicted with intent to commit the offence which carried the heavier penalty of the two new offences. It would have made no difference if the appellant's guilty conduct had taken place later (that is, under the new law) because the maximum sentence under the more serious of the new offences was the same as that under the old offence. The appellant had therefore suffered no injustice.

Article 16. Right to recognition as a person before the law

306. The position remains as reported in paragraph 196 of the previous report. That is, the right to recognition as a person before the law is guaranteed in article 13 of BOR which gives domestic effect to article 16 of the Covenant.

Article 17. Protection of privacy, family, home, correspondence, honour and reputation

307. Article 29 of the Basic Law guarantees that the homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.

308. Articles 30 of the Basic Law further guarantees that the freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents, except that the relevant authorities may inspect communications, in accordance with legal procedures, to meet the needs of public security or of investigation into criminal offences.

309. In addition, article 14 of BOR, which corresponds to this article, guarantees the protection of privacy, family, home, correspondence, honour and reputation.

Personal data privacy

310. As foreshadowed in paragraph 197 of the previous report, the Personal Data (Privacy) Ordinance (PDPO) was enacted in August 1995. Its core provisions were brought into operation on 20 December 1996.

311. PDPO provides for statutory control of the collection, holding and use of personal data in both the public and private sectors based on internationally accepted data protection principles. It applies to personal data to which access is reasonably practicable, whether they are in computerized, manual (for example, paper file) or audio-visual form.

312. To promote and enforce compliance with PDPO, an independent statutory authority, the Privacy Commissioner for Personal Data, with appropriate powers of investigation and enforcement, is provided for in PDPO. The first Privacy Commissioner was appointed on 1 August 1996. He is supported by an office of 33 staff. From 20 December 1996 to 30 June 1998, the Privacy Commissioner's Office (PCO) received 419 complaints and 22,826 inquiries in relation to compliance with the requirements of PDPO.

313. The Privacy Commissioner has approved and issued two codes of practices to provide practical guidance on compliance with PDPO. They are the Code of Practice on the Identity Card Number and other Personal Identifiers, issued on 19 December 1997, and the Code of Practice on Consumer Credit Data, issued in February 1998. The former governs the collection, use, disclosure and retention of, and other matters relating to, personal identifiers such as the Hong Kong Identity Card number, which is the most commonly-used personal identifier in Hong Kong. The latter lays down ground rules and increases transparency with respect to the use of personal data in the provision of consumer credit reference services.

314. Since its establishment on 1 August 1996, PCO has actively promoted public awareness of and compliance with PDPO. In 1997, it launched a large scale publicity campaign on individual's rights under PDPO. In 1998, emphasis will also be placed on data user education through presentations, briefing seminars and guidance publications.

Decision not to prosecute cases under the Personal Data (Privacy) Ordinance

315. In February 1998, the Privacy Commissioner referred eight cases for the consideration of the Director of Public Prosecutions (DPP), an office within the Department of Justice. The cases concerned alleged breaches of the Personal Data (Privacy) Ordinance. Having assessed the cases in the light of established prosecution policy 54/ and taking into account considerations of sufficiency of evidence and the public interest, DPP decided not to initiate prosecutions. In all these cases, the identity of the suspects was immaterial. However, some commentators considered that some of the decisions were unjust, believing that they had been based on political considerations, including the identities of the parties. They demanded public disclosure of the reasons.

316. The Department of Justice considered it improper to disclose the precise reasons for not prosecuting particular cases. To do so would open the issues of guilt and innocence to public debate and the persons involved could find

themselves convicted in the media and condemned at the bar of public opinion, without the opportunity of defending themselves before properly constituted courts. That could not be countenanced.

Law Reform Commission studies on privacy

317. The Law Reform Commission has published two reports on privacy. The first resulted in the enactment of the Personal Data (Privacy) Ordinance. Now, the Commission's Privacy Sub-Committee is examining the question of privacy in relation to "stalking", 55/ civil liability for invasion of privacy, the regulation of media intrusion, and criminal sanctions for unlawful surveillance.

318. A consultation paper on stalking was published in May 1998. Its findings and recommendations are contained in the executive summary in annex 13. The public had two months to comment on the proposals. The sub-committee will finalize its conclusions and recommendations after it has considered the responses.

319. In late 1998, the Privacy Sub-Committee will publish consultation papers on "Civil liability for invasion of privacy" (covering the civil aspects of surveillance) and the regulation of media intrusion. When it has completed its report on media intrusion, the Privacy Sub-Committee will finalize its recommendations on criminal sanctions for unlawful surveillance.

Interception of Communications Ordinance

320. Law enforcement agencies may only intercept communications in strict compliance with the law. The relevant provisions are those in section 33 of the Telecommunication Ordinance 56/ (chap. 106) and section 13 of the Post Office Ordinance 57/ (chap. 98). Safeguards are provided against abuse of powers:

(a) Interception operations must be authorized at the highest level of the Government; and

(b) Law enforcement agencies are bound by standing orders and guidelines that strictly control access to information intercepted.

In paragraph 18 of its concluding observations on the previous report, the Committee noted with concern that "these ordinances could be abused to intrude on the privacy of individuals and that their urgent amendment [was] urgently required".

Government consultation paper on the Interception of Communications Bill

321. As foreshadowed in paragraph 54 of the supplementary report, the Law Reform Commission published its report, entitled "Privacy: regulating interception of communications", in December 1996. In February 1997, the Government published a white bill on the interception of communications seeking public views on proposals to regulate the interception of communications by a judicial warrant system. Those proposals were based on recommendations in the Law Reform Commission's report. The white bill attracted a wide range of comments from the public. The Government is now

revising its proposals to take account of those comments and of the constitutional direction in article 30 of the Basic Law.

Non-commencement of the Interception of Communications Ordinance

322. This was a member's bill passed by the former Legislative Council in June 1997. It was drawn up without consultation with the administration and contained provisions which, if implemented, would seriously affect the ability of the law enforcement agencies to combat crime. For example, one provision allows the law enforcement agencies to renew warrants for interceptions once only, that single renewal being valid for just 90 days. This would seriously incapacitate the law enforcement agencies in tackling certain serious crimes, such as kidnapping and money laundering, that usually entail protracted operations. Therefore, the Government is carefully assessing the implications of the Ordinance before deciding on the way forward and has not appointed a commencement date for this Ordinance. 58/

Protection of prisoners' correspondence

323. We addressed this topic under article 10 in the previous report (para. 132). On reflection, we consider that the essential issue is the right to privacy, hence its discussion under article 17 in the present report.

Prison (Amendment) Rules 1997

324. In the previous report we explained that, at the time, Prison Rule 47 permitted prisoners to correspond only with their relatives and friends. It also restricted the number of letters they could write each week. Recognizing that these restrictions were inconsistent with article 14 of BOR (which gives domestic effect to article 17), we proposed removing the constraints imposed under rule 47. That was accomplished in 1997.

325. Generally speaking, there are now no restrictions on the number of letters prisoners may write. 59/ They may correspond with whoever they wish, though Prison Rule 47A (5) authorizes the Superintendent of the Correctional Services Department to stop letters for the purpose of maintaining security, good order and discipline. The prison authorities may read prisoners' correspondence in maximum security prisons; they may do so in other prisons in certain circumstances. 60/ But in no circumstances may they read prisoners' letters to and from the Chief Executive, Executive Council members, legislators, urban councillors, regional councillors, district board members, visiting justices of the peace, the Ombudsman and the Commissioner of ICAC.

Article 18. Freedom of thought, conscience and religion

326. Freedom of religion is one of the fundamental rights enjoyed by Hong Kong residents. At the constitutional level, it is enshrined in article 32 of the Basic Law (the full text is provided in annex 1). Religious organizations may freely acquire property, run schools, provide religious education and other social services. Those rights are protected under articles 137 and 141 of the Basic Law.

327. Additionally, article 15 of BOR gives domestic effect to article 18 of the Covenant.

Religious discrimination

328. There has been no history of religious discrimination in Hong Kong. But in the autumn of 1997 we twice saw press reports of possible instances. In one of the instances, it was reported that the complainant had applied for a teaching post at a religious school. In the other instance, the complainant had applied for a position as a social worker with a religious NGO. Both claimed to have been rejected because they did not subscribe to the relevant faiths.

329. Every effort was made to contact the complainants and to establish the facts as perceived by them and by the organizations in question. In neither case were we able to trace the parties allegedly involved (one wrote to us but did not supply a return address).

330. The Government is committed to the promotion of equal opportunities for all without distinction, including religious belief. In the area of education, religious schools that are subsidized by the Government are expected to practise non-discriminatory recruitment and admissions procedures. Government-subvented NGOs are expected to recruit social workers (and other staff) on the basis of open and fair competition and to select candidates on the basis of their qualifications, experience and ability. So far, we have not received complaints of discrimination on grounds of religious belief (as stated, those discussed above came to our attention through press reports). But, as in the cases discussed, we are always prepared to investigate such complaints with the assistance of the schools or NGOs involved.

Article 19. Freedom of opinion and expression

331. At the constitutional level, article 27 of the Basic Law provides, inter alia, that Hong Kong residents shall have freedom of speech, of the press and of publication. Article 34 of the Basic Law also provides that Hong Kong residents shall have freedom to engage in academic research and cultural activities.

332. Article 16 of BOR gives domestic effect to article 19.

Press freedom and self-censorship

333. The Government is committed to maintaining a free press. Its policy is to maintain an environment in which a free and active press can operate under minimum regulation - regulation that does not fetter freedom of expression or editorial independence. To this end, since the enactment of BORO in June 1991, the Government has examined 53 separate provisions in 27 ordinances and removed provisions that threaten press freedom. To date, 96 per cent of the provisions have been dealt with: 40 have been amended or repealed and 11 left unaltered as they are compatible with BORO and the Covenant. The remaining two provisions, which relate to the interception of communications, are under review; see paragraphs 320 to 322 above in respect of article 17.

334. Some commentators have expressed the concern that the Hong Kong media has been exercising self-censorship. As indicated in paragraph 245 of the previous report and paragraph 57 of the supplementary report, the Government does not believe that it should intervene in such matters. Any such intervention, no matter how well intentioned, could easily be mistaken for

interference with editorial independence or, at best, a lack of confidence in the professional integrity of our journalists. In any case, experience indicates that the concerns have been exaggerated. We continue to see media reports on all issues, including those relating to the mainland, Taiwan and Tibet. And all branches of the media fearlessly publish views and articles critical of both the Central People's Government and the Special Administrative Region Government.

Code on Access to Information

335. In recent years, as explained in paragraph 242 of the previous report, the Government has taken measures to improve public access to information. Its policy is to make available to the public as much information as possible to enhance their understanding of the formulation and implementation of policy so that they can more readily understand the basis on which the Government makes its decisions.

336. In furtherance of that policy, and as explained in paragraph 244 of the previous report, we introduced an administrative Code on Access to Information in March 1995, initially on a pilot basis but, by December 1996, across the whole of government. Under the Code, information held by the Government will be made available to the public, either routinely or on request, unless there are valid reasons, related to public, private or commercial interests, to withhold it. Those reasons are set out in Part 2 of the Code, the whole of which is reproduced in Annex 14. Members of the public who are dissatisfied with a department’s response under the Code have access to the Ombudsman.

337. Experience so far has shown that the Code provides a workable framework for public access to information held by the Government. This is, perhaps, best demonstrated by the rate of compliance. From 1 March 1995 to 30 June 1998, the Government had received a total of 4,190 requests for information. The response was as follows:

	Percentage
Met in full	85.3
Met in part	2.0
Declined	2.6
Documents requested not held by departments concerned	5.0
Withdrawn by requesters	3.3
Others	1.8
	100

338. Nine complaints have been lodged with the Ombudsman:

	Number
(a) Complaints investigated	
Unsubstantiated	2
Partially substantiated	1
Substantiated	1
(b) Complaints being examined	1
(c) Complaints concluded by rendering assistance/clarification to complainants after examination of information provided by the departments concerned	2
(d) Complaints withdrawn by complainants	2
Total	9

339. In late 1997, the Hong Kong Journalists Association, which is actively interested in issues concerning the freedom of information, conducted a survey to test the effectiveness of the Code. In early 1998, it issued a press release on its findings, stating that

> "A total of 81 documents were requested, carefully selected to give a representative result. Only 35 per cent were available in full. Nine per cent were withheld in part and 25 per cent were withheld in full, all citing reasons provided under the Code. Thirty-two per cent were not available for other reasons."

The Association concluded that the Code had failed and called on the Government to start work on a freedom of information ordinance.

340. The Government's own records of its response to the survey differ significantly from those of the Association. Our statistics are kept in terms of the number of requests for documents and not the number of documents requested. The records show that the Association's researcher made 43 requests: 40 per cent of them were met in full, 14 per cent were met in part, 9 per cent were declined and 37 per cent were for documents which had not yet been completed or that the departments concerned did not possess.

341. With a view to reconciling our figures with the Association's, we recast our statistics in terms of the number of documents requested. This exercise revealed that, disregarding documents requested that had not yet been completed or that the departments concerned did not possess, the Association had requested a total of 171 documents, of which 115 (67 per cent) were provided by the departments concerned.

342. We have continued to try, without success, to reconcile the Association's findings with ours. But the fact remains that the Association's findings paint a substantially different picture to that provided by the

overall figures (para. 340 above). We believe that the nature of the documents requested by the Association is not representative of that normally requested by general members of the public.

343. The Government does not agree that freedom of information legislation is necessary. Nor does it believe that such legislation would be an improvement on the guarantees now in place. This is because

(a) Even in countries with freedom of information legislation, particular categories of documents are exempted from access by the public. The exemptions in Hong Kong's Code are similar to those in the legislation of those countries. Thus, it cannot be assumed that legislation would necessarily provide the public greater access than it now enjoys to information held by the Government; and

(b) The perceived advantage that legislation has over the Code is that, with legislation, a refusal by a department to an access request can be challenged in court. In our view, the advantage is more apparent than real: any complaint about refusal under the Code can be investigated by the Ombudsman. In no such case has a department declined to accept the Ombudsman's decision.

344. An additional consideration is that in some countries the freedom of information laws provide for individuals' right to have access to and to correct personal data that government departments hold on them. In Hong Kong, that right is conferred under the Personal Data (Privacy) Ordinance, which applies to all personal data held by data users in both the public and private sectors.

Regulation and licensing of the broadcast media

345. In paragraphs 214 to 221 of the previous report, we explained amendments made to the three ordinances relating to broadcasting 61/ to enhance the right to freedom of expression. Those amendments removed provisions for the pre-censorship of programmes. They also removed the Government's power to give direction to the (independent) Broadcasting Authority regarding the standard and content of television broadcasts. As foreshadowed in paragraph 220 of the previous report, section 13 C (3) (a) of the Telecommunication Ordinance was repealed in November 1996. 62/ Amending provisions have been made for a licensing framework for the provision of programme services, including the provision of video-on-demand services. 63/

346. Hong Kong currently has two commercial television broadcasting licensees, one subscription television broadcasting licensee, one programme service licensee and two satellite television uplink and downlink licensees. There are also two commercial sound broadcasting licensees. All are subject, where relevant, to one or more of the three principal ordinances; to the regulations made under them; to the terms and conditions of their respective licences; and to the codes of practice prescribed by the Broadcasting Authority. Some are required by the terms of their licences to broadcast announcements or materials required by the Broadcasting Authority (which may be supplied by the Government). 64/

347. The public also has access to overseas programmes via satellite transmission. Individual television reception facilities do not require licences, but Satellite Master Antenna Television (SMATV) systems that enable the distribution of satellite services to multiple households must be licensed under the Telecommunication Ordinance. At present, some 1,600 SMATV systems serve around 500,000 families.

Radio Television Hong Kong (RTHK)

348. RTHK is a publicly funded and editorially independent broadcaster whose mission is to inform, educate and entertain the public through the provision of balanced and objective programmes. Administratively, RTHK is overseen by the Government's Information Technology and Broadcasting Bureau. 65/ RTHK has always operated with editorial independence from the Government. This understanding was clearly documented in the 1997 "Framework agreement" between the Government and RTHK, which provides that the Director, as chief editor, shall ensure that the programmes that RTHK produces are fair, balanced and objective.

349. Concerns have been expressed as to whether RTHK will continue to maintain the editorial independence that it now enjoys. These concerns arose from remarks made in March 1998 by a Hong Kong delegate to the Chinese People's Political Consultative Conference regarding the role of RTHK as a government-owned broadcaster. In April 1998, in a motion debate of the Provisional Legislative Council, the Government addressed these concerns, reaffirming its policy of upholding the editorial independence of RTHK. The Council strongly endorsed the RTHK editorial policy of fairness, objectivity and impartiality. RTHK has undertaken to formulate "Producers' guidelines" prescribing the editorial and ethical standards that it will pursue in programme production.

Restrictions on cross-ownership of the media

350. Cross-ownership of broadcasting licences is restricted in order to prevent monopoly of the media and conflicts of interest. The restriction also promotes pluralism and editorial diversity. Individuals or companies defined in the Television Ordinance as "disqualified persons" (for example, advertising agencies, existing television licensees, companies which transmit television or radio material within and outside Hong Kong) may not exercise control of a television licensee except with the approval of the Chief Executive in Council. In May 1997, by amendment to section (2) of the Television Ordinance, the definition of "disqualified person" was extended to newspaper publishers.

Film classification system

351. All films intended for public exhibition must be approved by the Commissioner for Television and Entertainment Licensing, who is the Film Censorship Authority (FCA) under the Film Censorship Ordinance (chap. 392). Sections 10 (2) and (3) of the Ordinance provide that, when approving a film for exhibition, censors must consider

(a) Whether the film portrays, depicts or treats cruelty, torture, violence, crime, horror, disability, sexuality, or indecent or offensive language or behaviour;

(b) Whether the film denigrates or insults any particular class of the public by reference to the colour, race, religious beliefs or ethnic or national origins or the sex of the members of that class;

(c) The effect of the film as a whole;

(d) The artistic, educational, literary or scientific merit of the film and its importance or value for cultural or social reasons; and

(e) In relation to the intended exhibition of the film, the circumstances of such exhibition.

If a censor considers that the film is suitable for exhibition, he will classify it as provided in section 12 of the Ordinance:

Category I	Suitable for all ages;
Category II_A	Not suitable for children;
Category II_B	Not suitable for young persons and children;
Category III	For persons aged 18 or above only.

352. The standards in the classification of films are kept in line with those of the community by means of regular surveys of community views and consultation with a statutory panel of advisers comprising more than 330 members from a wide cross-section of the community. Categories I, II_A and II_B 66/ are advisory in nature. But the age restriction for Category III films is strictly enforced. Packagings of Category III videotapes and laserdiscs and materials advertising Category III films must be approved by FCA before they can be published or publicly displayed (sects. 15B and 15K of the Film Censorship Ordinance). The latter requirement was introduced in November 1995 to control public display of offensive film promotion materials.

Appeals against the decisions of FCA and the censors

353. Sections 17 to 19 of the Film Censorship Ordinance empower the Board of Review (Film Censorship) to review the decisions of FCA and the censors. The Board's membership comprises nine non-official members appointed by the Chief Executive and the Secretary for Information Technology and Broadcasting ex officio.

Regulation of obscene and indecent articles

354. Advertising material for Category III films and films that are for public exhibition are regulated under the Film Censorship Ordinance. Those that are not for public exhibition are regulated under the Control of Obscene and Indecent Articles Ordinance (COIAO) (chap. 390). This controls obscene and indecent articles (including printed matter, sound-recordings, films, videotapes, discs or electronic publications). The content of sound and television broadcasts is governed by the Television Ordinance (chap. 52) and the Telecommunication Ordinance (chap. 106).

355. Section 2 (2) of COIAO provides that

> "(a) A thing is obscene if by reason of obscenity it is not suitable to be published to any person; and
>
> (b) A thing is indecent if by reason of indecency it is not suitable to be published to a juvenile."

Section 2 (3) provides that "obscenity" and "indecency" "include violence, depravity and repulsiveness".

356. Section 8 of the Ordinance prescribes a classification hierarchy under which articles may be

Class I Neither obscene nor indecent;

Class II Indecent; or

Class III Obscene.

Class I articles may be published without restriction. Class II articles must not be "published to a juvenile". 67/ Publication of Class II articles must comply with the restrictions prescribed in relevant sections in Part IV of the Ordinance. These include the requirement to seal such articles in wrappers and to display a warning notice as prescribed in section 24. Class III articles may not be published. The Ordinance is enforced by the Television and Entertainment Licensing Authority, the Customs and Excise Department and the police.

357. COIAO also provides for the establishment of an Obscene Articles Tribunal, a judicial body with exclusive jurisdiction to determine whether articles published or intended for publication are obscene, indecent or neither. The Tribunal comprises a presiding magistrate and two or more members of the public selected from a wide spectrum of the community to serve as adjudicators. Submission of articles to the Tribunal is entirely voluntary. But the Secretary for Justice and any public officer authorized by the Chief Secretary may submit any article to the Tribunal for classification. In determining whether an article is obscene or indecent, a Tribunal shall have regard, among other things, to the standards of morality, decency and propriety that are generally accepted by reasonable members of the community.

358. To strengthen the independence and representativeness of the Tribunal, COIAO was amended in July 1995

(a) To increase from two to four the minimum number of adjudicators at full hearings conducted to review the "interim classification" 68/ of articles or to reconsider previously classified articles; and

(b) To provide that adjudicators who were involved in the interim classification of an article may not sit as members of the Tribunal at a full hearing in relation to that article.

Content regulation on the Internet

359. The Government's policy is to strike a balance between protecting public morals (and the vulnerable young) and preserving the free flow of information, the freedom of expression and access to information. In July 1996, we conducted public consultations to assess the views of both the industry and the community on the need to regulate the content of information transmitted on the Internet. The response was overwhelmingly in support of self-regulation through the development of a code of practice by Internet service providers. In practical terms, the Government agrees with the industry that it is impossible to monitor the content of the Internet, which transmits vast volumes of information anonymously and at high speed. Accordingly in October 1997, with the Government's assistance, the Hong Kong Internet Service Providers' Association adopted a code of practice that addressed the question of obscene and indecent material on the Internet in the spirit of COIAO. A complaints handling mechanism was also established. We will review the effectiveness of the code and consider whether there is a need for further measures.

Hong Kong Arts Development Council

360. The establishment of the Council (in June 1995) was explained in paragraph 241 of the previous report. Details of the Council's work are discussed under article 15 of the initial report on the HKSAR under the International Covenant on Economic, Social and Cultural Rights.

Crimes Ordinance

The Crimes Ordinance and article 23 of the Basic Law

361. Article 23 of the Basic Law states that the HKSAR shall enact laws on its own to prohibit any act of treason, secession, sedition and subversion against the Central People's Government. The provision entails complex issues that require careful study with particular regard to the provisions of the Covenant. For these reasons, the Government has yet to formulate legislative proposals to implement this provision. When such proposals are ready, there will be extensive public consultation before they are introduced into the Legislative Council. Any such proposals will need to address the concern expressed by many commentators that the requirements of article 23 should not compromise the freedom of expression. And, by virtue of article 39 of the Basic Law, they will need to be consistent with the provisions of the Covenant as applied to Hong Kong.

Crimes (Amendment) (No. 2) Ordinance

362. The Crimes (Amendment) (No. 2) Ordinance was passed by the former Legislative Council in June 1997. It dealt with treason and sedition, but did not address either secession or subversion as required under article 23 of the Basic Law. We therefore considered it prudent to defer its commencement until legislative proposals had been formulated to give comprehensive legal effect to article 23. In the meantime, the pre-existing provisions of the Crimes Ordinance on treason and sedition continue to apply. For the reasons set out in the previous paragraph, provisions introduced to give effect to article 23 will, like all other laws, be subject to those of the Covenant as applied to Hong Kong.

The Official Secrets Ordinance

363. The Official Secrets Ordinance was enacted in June 1997. It replaced the United Kingdom Official Secrets Acts, which ceased to apply to Hong Kong on 1 July 1997. Its purpose is to protect classified official information from unlawful disclosure or other unlawful use. The opportunity was taken to modernize those protections by amending or removing provisions in the United Kingdom Acts that were either covered in other legislation or were outdated or were inconsistent with Hong Kong's legislative practices.

364. Some commentators consider that the new Ordinance should have included defences on the grounds of public interest and prior disclosure. The Government does not consider that necessary. The Ordinance defines the areas of information that need to be protected on the clear and narrow basis that the unlawful disclosure of such information would, of itself, cause or be likely to cause substantial harm to the public interest. It is considered that every such disclosure should be judged on its own merits by the courts. The Ordinance, as enacted, is necessary for the protection of Hong Kong's security. As such, the Government believes that it is consistent with the restrictions in article 19.3.

Freedom of information: the Prison Rules and the "horse-racing case"

365. Article 16 of the Bill of Rights (BOR), which corresponds to this article, was invoked in the case of Chim Shing Chung v. Commissioner of Correctional Services [1996] 6 HKPLR 31. The respondent was a prisoner who had arranged, in accordance with the relevant Prison Rules, to have a newspaper delivered to him every day. The applicant had a particular interest in horse racing and followed the racing sections of the paper. The Commissioner of Correctional Services ordered the removal of the special racing supplements which formed part of the newspaper on race days, in accordance with the Prison Rules, 69/ in order to maintain good order and discipline in prison. It was argued that this contravened article 16 of BOR.

366. The Court of First Instance held that a convicted prisoner, in spite of imprisonment, retained all civil rights that were not taken away expressly or by necessary implication. The removal of the horse-racing supplement was not authorized under the Prison Rules made by the Governor-in-Council under section 25 of the Prisons Ordinance (chap. 234). The Commissioner's action contravened article 16 of BOR and was therefore unlawful. The Court of Appeal overturned this ruling, holding that it was clear from section 2 (2) of BORO that the rights in BOR, including the rights under article 16, were subject to the relevant exceptions and savings in Part III of BORO. In this instance, the relevant provision was section 9:

> "persons lawfully detained in penal establishments ... are subject to such restrictions as may from time to time be authorized by law for the preservation of ... custodial discipline".

Prison Rule 56 was such a "restriction authorized by law". Therefore, article 16 was not engaged. The Commissioner's decision was legally based on Prison Rule 56, and his decision to remove racing supplements on race days was a necessary and reasonable restriction for maintaining institutional good order and discipline inside the prison.

367. Prison Rule 56 was amended in 1997. Now it provides that prisoners may receive books, periodicals, newspapers or other publications from outside the prison as the Commissioner may determine. But the Superintendent may, in respect of any of the prisoners, withhold and dispose of a publication or any part thereof where he has reasonable grounds to believe that such publication or such part thereof contains the types of information specified in the rule (such as information that depicts or encourages violence in prison; or facilitates gambling in prison; or is detrimental to the rehabilitation of any of the prisoners in prison; and so forth).

National Flag and National Emblem Ordinance, Regional Flag and Regional Emblem Ordinance

368. Article 18 of the Basic Law provides that the national laws listed in annex III of the Basic Law shall apply to the HKSAR. It also provides that the Standing Committee of the National People's Congress (NPCSC) may add to or delete from the list of laws in annex III after consulting its Committee for the Basic Law of HKSAR and the Government of the Region. On 1 July 1997, pursuant to and in accordance with this provision, NPCSC adopted a decision to add to the list in annex III the Law of the People's Republic of China on the National Flag and the Law of the People's Republic of China on the National Emblem. The decision took effect from 1 July 1997.

369. Article 18 also provides that national laws listed in annex III "shall be applied locally by way of promulgation or legislation by the Hong Kong Special Administrative Region". To that end, the National Flag and National Emblem Ordinance was enacted on 1 July 1997 to provide for the use and protection of the national flag and national emblem in the Region. At the same time, the Regional Flag and Regional Emblem Ordinance was enacted to provide for the use and protection of the regional flag and regional emblem of the HKSAR in accordance with article 10 of the Basic Law.

370. Under section 19 of the Law of the People's Republic of China on the National Flag and section 13 of the Law of the People's Republic of China on the National Emblem, a person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence. This is applied locally through section 7 of the National Flag and National Emblem Ordinance, which provides that a person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine of $50,000 and to imprisonment for three years. The Regional Flag and Regional Emblem Ordinance makes similar provision for the protection of the regional flag and regional emblem.

371. The purpose of these provisions is to protect the national and regional flags as symbols of the People's Republic of China and the HKSAR. Other jurisdictions have similar provisions protecting their national flags.

372. The first prosecution under the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance was brought against two men who were charged for desecrating a national flag and a regional flag by defiling them during a procession. The trial commenced in May 1998.

373. Some commentators consider that the prosecution - and, indeed, the Ordinances themselves - infringe the right to freedom of expression. At the time of drafting this report, the case was sub judice. But the committee may wish to note that the magistrate who first heard the case ruled that section 7 of the Ordinance restricted the right to freedom of expression guaranteed by this article. However, this was justified under subsection 3 of this article in that such a law was necessary for the protection of public order because, in his opinion, bearing in mind the significance of the status that the national flag occupied in the mind of an ordinary Chinese citizen, it would not be difficult for a reasonable man to visualize the possibility that burning or desecrating that flag could "trigger off" a confrontation or even a riot. This was so even if the occasion proceeded in a peaceful and orderly manner, because any responsible Government should not overlook the real possibility of social disorder being caused by the act of desecration. The Government need not wait until a riot had broken out before legislating against such desecration.

374. The defendants were found guilty on both charges. They were conditionally discharged by self-recognizance in the sum of $2,000 to be of good behaviour for 12 months in relation to each charge. The case is subject to appeal by the defendants. A date will be fixed in the Court of First Instance for the hearing of the appeal.

Display of Taiwan flags

375. On 10 October 1997, the police removed a small number of Taiwan flags from government land in accordance with section 6 (2A) of the Land (Miscellaneous Provisions) Ordinance (chap. 28). This provides that any public officer or other person acting on the direction of the appropriate authority may remove any structure erected on or over unleased land without a licence.

376. Some commentators consider that this action infringed the freedom of expression. The Government's position is that the action was taken with regard to the "one China" principle and in accordance with the provisions of chapter 28.

Article 20. Prohibition of propaganda for war

377. As stated in paragraphs 105 and 106 of the United Kingdom's initial report on Hong Kong, 70/ the criminal law does not specifically prohibit the distribution of propaganda for war. However, if such propaganda, or its manner of presentation, were such as to bring the sovereign Government into hatred or contempt or generally to create disorder, discontent or disaffection, it might amount to sedition under the current law, at least if there was an intention to provoke a breach of the peace. If such propaganda were intended or tended to cause a breach of the peace and the language used were threatening, abusive or insulting, a prosecution might proceed under the Crimes Ordinance (chap. 200) or the Public Order Ordinance (chap. 245).

378. As reported in paragraph 248 of the previous report, section 33 of the Television Ordinance and section 13 M of the Telecommunication Ordinance give the Court of First Instance (formerly known as the High Court) authority to prevent the broadcast of particularly offensive material that is likely to

incite hatred against any group of persons by reference to their race, sex, religion, or ethnic origin; result in a general breakdown of law and order; or gravely damage public health or morals.

Article 21. Right of peaceful assembly

379. At the constitutional level, article 27 of the Basic Law guarantees the freedom of association, of assembly, of procession and of demonstration. Article 17 of BOR gives domestic effect to the provisions of article 21.

The operation of the Public Order Ordinance

380. The Public Order Ordinance (chap. 245) is the principal legal instrument for the regulation of public meetings and processions. In February 1997, in accordance with article 160 of the Basic Law, the Standing Committee of the National People's Congress (NPC) of the People's Republic of China decided, inter alia, that certain amendments that had been made to the Societies Ordinance (chap. 151) and the Public Order Ordinance (chap. 245) (since 1992 and 1995 respectively) should not be adopted as the laws of the HKSAR. NPC also resolved that the HKSAR should enact laws on its own to ensure that there would be no legal vacuum on 1 July 1997.

381. Taking into account public views, 71/ the then Chief Executive (Designate)'s Office introduced two amendment bills in the Provisional Legislative Council in May 1997. 72/ The proposed amendments were based on the following three guiding principles:

(a) Striking a proper balance between civil liberties and social order;

(b) Upholding the Basic Law and the Covenant as applied to Hong Kong;

(c) Guarding against interference by foreign political forces in local political activities.

The bills were passed by the Provisional Legislative Council and came into effect on 1 July 1997. Annex 15 explains the amendments in chart form. 73/

382. The major change to the Public Order Ordinance was the introduction of a "Notice of no objection" system for the organization of public processions. This requires organizers of public processions, in normal circumstances, to notify the Commissioner of Police of their intention to hold processions at least seven days in advance (this was the practice before the Ordinance was amended). The Commissioner must give a clear reply, stating whether he has any objection to the activity, no less than 48 hours prior to the scheduled procession. If the Commissioner objects to the procession, he must inform the organizers of his reasons for so objecting. Those reasons must comply with the provisions of article 21 of the Covenant. If the organizers are aggrieved by the Commissioner's decision, they may appeal to an independent appeal board formed under the Public Order Ordinance. Alternatively, they may apply for judicial review.

383. The Ordinance empowers the Commissioner of Police to impose conditions or to prohibit/object to the holding of public meetings and processions on grounds of "national security, public safety, public order (ordre public) and

protection of rights and freedom of others if it is reasonably considered necessary". This formulation is to ensure consistency with article 21 of the Covenant. 74/

384. There have been concerns that these amendments would have adverse effects on the freedom of assembly. This has not proved to be the case and peaceful demonstrations remain very much a way of life in Hong Kong. The police have not prohibited or objected to any public meetings or processions since the amendments came into effect. Indeed, some 1,807 public meetings and processions were held between 1 July 1997 and 30 June 1998. Most were peaceful and orderly. They have resulted in only nine people being prosecuted in a total of just two cases. Four of the persons so prosecuted were convicted for breaching the Legislative Council (Power and Privileges) Ordinance (chap. 382), two for obstructing the police on duty, an offence under the Summary Offences Ordinance (chap. 228), and two for assaulting police officers, an offence under the Police Force Ordinance (chap. 232).

385. There has been no change in the way that demonstrations are handled. The police seek to strike a balance between the rights of participants to express their views freely and the need to ensure that no danger or inconvenience is caused to others. All police officers are instructed, in all circumstances, to exercise maximum restraint, to use minimum force, and to use that only when absolutely necessary.

Complaint against police handling of a demonstration at the 30 June 1997 reunification ceremony

386. Commentators have expressed concern that actions taken by police officers on duty outside the venue of the reunification ceremony may have constituted an infringement of the freedom of expression. Their concerns stem from a complaint lodged by a participant in a demonstration there that his public address was effectively "drowned out" when the police broadcast a recording of Beethoven's fifth symphony at high volume. The Complaints Against the Police Office (CAPO) (see para. 55 under art. 2) investigated the complaint and found that there was inadequate evidence that the broadcast was an unnecessary use of authority. However, the Independent Police Complaints Council (IPCC) (see para. 55 above) disputed these findings and held the complaint substantiated.

387. IPCC made the following recommendations, which have been accepted by the Commissioner of Police:

(a) The Police should normally act under the presumption that demonstrators are doing no more than exercising their freedom of expression protected under the Basic Law and BOR, unless there is very specific and reliable information to the contrary;

(b) Police tactics in handling demonstrations should be reviewed to ensure that they conform with this approach. In particular, police procedures and measures should be commensurate with the actual behaviour shown by the demonstrators, in terms of any direct threat to public order, rather than imagined possible motives or possible actions of the demonstrators;

(c) The measures adopted should be designed to ensure that demonstrations are facilitated in a way which does not give rise to a breach of public order or public peace;

(d) The police should avoid tactics which have the effect of or which may reasonably give rise to the perception that the rights or freedom of expression and of assembly and demonstration are being unnecessarily curtailed.

The Commissioner of Police will incorporate these recommendations in the procedures and guidelines for handling public processions and meetings.

Article 22. Freedom of association

388. Article 27 of the Basic Law guarantees that Hong Kong residents shall have freedom of association and the right and freedom to form and join trade unions, and to strike. Article 18 of BOR, which corresponds to this article, also guarantees the freedom of association.

The operation of the Societies Ordinance

389. As explained in paragraphs 380 to 381 above in relation to article 21, NPC decided in February 1997 that certain amendments to the Societies Ordinance (chap. 151) introduced since 1992 were inconsistent with the Basic Law and therefore could not be adopted as the laws of the HKSAR. Consequent on that decision, the then Chief Executive (Designate)'s Office introduced a bill to amend the Ordinance in accordance with the three guiding principles reported in paragraph 381 above in relation to article 21. As in the case of the Public Order Ordinance, these amending proposals were set out in a consultation document published in April 1997. The bill was approved by the Provisional Legislative Council and came into effect on 1 July 1997. Annex 16 explains the amendments in chart form.

390. The Amendment Ordinance proscribes certain connections between local societies and foreign countries:

(a) Soliciting or accepting financial contributions, financial sponsorships or financial support of any kind, or loans, directly or indirectly, from a foreign political organization or a political organization of Taiwan;

(b) Affiliating directly or indirectly with a foreign political organization or a political organization of Taiwan;

(c) Any of the society's policies being determined directly or indirectly by a foreign political organization or a political organization of Taiwan; and

(d) The decision making process of the society being directed, dictated, controlled, participated in directly or indirectly, by a foreign political organization or a political organization of Taiwan.

The Government considers that these restrictions are both reasonable in Hong Kong's circumstances and necessary for the protection of national security in accordance with subsection 2 of this article.

391. The Amendment Ordinance introduced a “registration” system. This was to ensure that the Societies Officer (the Commissioner of Police) had sufficient information on the basis of which to determine whether a society should be allowed to operate in Hong Kong. It also reduced the likelihood of non-compliance with the requirements of the Ordinance. Within one month of their establishment, societies must apply to the Societies Officer for registration or exemption from registration. The Societies Officer may refuse such applications and cancel the registration of an existing society, or, where applicable, its exemption from registration. However, that power is restricted to the grounds provided for in this article. He/she may only do so after consulting the Secretary for Security and if

(a) He/she reasonably believes that the refusal or cancellation is necessary in the interest of national security or public safety, public order (ordre public) or the protection of the rights and freedom of others; or

(b) The society is a political body that has a connection with a foreign political organization or a political organization of Taiwan.

These conditions also restrict the power of the Secretary of Security to make orders prohibiting the operation of societies. In both situations, the societies concerned would have the opportunity to be heard or to make written representations against the decisions of the Societies Officer or the Secretary for Security. Persons aggrieved by those decisions are entitled to appeal to the Chief Executive in Council or to apply for judicial review.

392. Some commentators consider that the amendments unduly restrict freedom of association. They do not. Between 1 July 1997 and 30 June 1998, 883 societies were registered or exempted from registration. The Commissioner of Police has not objected to any applications for the formation of societies. Nor has the Secretary for Security made orders prohibiting the operation of any society.

Statutory protection against anti-union discrimination

Amendments to the Employment Ordinance

393. Section 21 B (1) of the Employment Ordinance confers on employees the rights to:

(a) Be or to become members or officers of trade unions registered under the Trade Unions Ordinance;

(b) Take part in, at any appropriate time, the activities of the trade union of which they are members or officers; and

(c) Associate with other persons for the purpose of forming or applying for the registration of a trade union.

394. Workers who participate in trade union activities are protected from anti-union discrimination and interference under Part IV A of the Employment Ordinance. The Ordinance prohibits employers from preventing or deterring an employee from exercising trade union rights and the right to participate in trade union activities. Employers are also prohibited from dismissing, penalizing and discriminating against employees for exercising such rights. Employers who contravene these provisions shall be guilty of an offence and shall be liable on conviction to a fine of HK$ 100,000.

395. In June 1997, new provisions were introduced into the Ordinance 75/ enabling employees to claim remedies in the event of being dismissed for exercising their rights in respect of trade union membership and/or activities within the 12 months immediately before such dismissal. If the employer fails to show a valid reason for such dismissal, 76/ the Labour Tribunal may order reinstatement or re-engagement, subject to mutual consent by both parties. Alternatively, the tribunal may award terminal payments against the employer. Where no order for reinstatement or re-engagement is made, and irrespective of whether or not there is an award of terminal payments, the Labour Tribunal may, in appropriate cases, also award the employee compensation of up to HK$ 150,000.

396. As stated in paragraph 388 above, article 27 of the Basic Law guarantees, inter alia, the right to strike. Additionally, article 39 provides for the continued application of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Conventions that apply to Hong Kong. The Committee is, of course, aware that article 8.1 (d) of the International Covenant on Economic, Social and Cultural Rights guarantees the right to strike.

397. The Employment Ordinance provides that, where employees who have been given notice by their employers to terminate their contracts take part in a strike before the expiry of such notice, their entitlements to severance pay, long service payments, or other employment benefits will not be affected by their taking part in the strike. However, as explained in paragraph 56 of the United Kingdom's third report in respect of Hong Kong under the International Covenant on Economic, Social and Cultural Rights, the Labour Relations Ordinance provides that, where a dispute is of such a nature and scale as to have a grave effect on the economy of the HKSAR or to endanger the lives of a substantial number of people, the Chief Executive in Council may make an order for a cooling-off period. A cooling-off period shall not exceed 30 days. But it can be extended to a total of 60 days, during which all forms of industrial action must be discontinued. To date, this power has never been exercised.

Regulation of trade union activities

Number and membership of employees' unions in Hong Kong

398. The changing pattern of union membership reflects the changing structure of Hong Kong's economy:

Economic sector	Number of unions		Declared membership	
	31 Dec 1994	31 Dec 1997	31 Dec 1994	31 Dec 1997
Agriculture and fishing	2	0	1 235	0
Mining and quarrying	0	0	0	0
Manufacturing	93	87	67 100	72 617
Electricity, gas and water	10	4	5 317	2 541
Construction	23	22	18 397	25 819
Wholesale, retail and import/export trades, restaurants and hotels	35	37	50 059	52 392
Transport, storage and communication	79	85	87 995	105 242
Finance, insurance, real estate and business services	7	14	30 260	35 534
Community, social and personal services	257	289	301 922	353 763
Total	506	538	562 285	647 908
Union participation rate in terms of salaried employees and wage earners	20.90% as at 31 Dec 1994		21.85% as at 31 Dec 1997	

399. The Trade Unions Ordinance (chap. 332) defines a “trade union” as “any combination the principal objects of which are, under its constitution, the regulating of relations between employees and employers, employees and employees, or between employers and employers”. The Ordinance requires all trade unions to be registered with the Registrar of Trade Unions. It also provides for the regulation of trade unions' internal administration and extends certain statutory immunities to registered trade unions.

400. In 1997, the Ordinance was amended to:

(a) Extend the protection against civil suits for certain acts done in furtherance of trade disputes. Formerly, that protection applied only to registered trade unions. Now it also applies to employers, employees, and members and officers of registered trade unions; 77/

(b) Remove the prohibition on federations of unions belonging to different trades, industries or occupations; and

(c) Allow unions to join organizations of workers, employers and relevant professional organizations in foreign countries without the need to obtain the prior approval of the Government.

401. As explained in paragraph 258 of the previous report, section 17 (1) of the Ordinance provides that a member of a trade union should be engaged or employed in a trade, industry or occupation with which the union is directly concerned. The provision remains in force and, as previously reported, some unionists maintain the view that this restricts freedom of association. The Government's position remains that the provision does not restrict trade unions to any one particular trade or industry. Workers from different occupations, industries or trades have the right to form unions of common interest and, as we said in the previous report, that right is frequently exercised.

Ban on members of the Police Force joining trade unions

402. The position remains as described in paragraph 262 of the previous report. That is, section 8 of the Police Force Ordinance (chap. 232) prohibits members of the Hong Kong Police Force from joining trade unions. This restriction is consistent with article 18 (2) of the Hong Kong Bill of Rights and subparagraph 2 of this article of the Covenant. However, the Commissioner of Police may establish and recognize associations composed only of police officers. These associations are members of the Police Force's three staff consultative bodies, namely the Police Force Council and the Senior and Junior Consultative Committee. The Commissioner of Police will consult these bodies on matters relating to the welfare and conditions of service of police officers.

403. In 1995, as foreshadowed in paragraph 260 of the previous report, section 59 (6) of the Road Traffic Ordinance (chap. 374), which provided that traffic wardens required the consent of the Commissioner of Police before joining a trade union, was repealed.

Organizations for the promotion of human rights

404. Relative to the size of its territory and population, Hong Kong has a healthy number of organizations and individuals dedicated to the promotion of human rights. Some are “issue-focused”, concentrating on such issues as the rights of refugees, children or women. Others have a wider mandate, embracing all or most of the issues addressed in the two Covenants and the four major Conventions. 78/

405. Annex 17 lists those considered most active in their respective spheres of interest, though we must acknowledge that the list is not exhaustive. For

example, it does not include the numerous well-established charities whose many activities inevitably address human rights concerns. Those that are listed are those that consciously seek to promote the specific rights guaranteed under the United Nations human rights treaties. It will be seen that they include several NGOs of international distinction and others that are essentially "indigenous".

406. The Government has increasingly sought contact and collaboration with the NGOs. In recent years, they and we have worked together on the production of educational materials. We have sought their views on issues of policy and have invited their comments on the issues addressed in the periodic reports under the United Nations human rights treaties (including the present report).

407. Our views and those of the NGOs may often differ. But we respect their opinions and value their contribution to the betterment of the quality of life for all in the Special Administrative Region. It is our firm intention to maintain and extend our relationship with them.

Article 23. The family - a vital component of society

408. Article 37 of the Basic Law provides that the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law. Article 19 of BOR gives domestic effect to article 23 of the Covenant.

409. The general position remains essentially as explained in paragraphs 270 and 272 of the previous report. The Government continues to regard the family as a vital component of society that provides the intimate environment of physical care, mutual support and emotional security necessary to the healthy development of children. Potentially, it provides support and strength for the infirm, the elderly, the disabled and the delinquent. It remains our policy to preserve and strengthen the family as a basic social unit.

410. The processes previously reported as contributing to the demise of the traditional extended family - urbanization, the emergence of new towns and external influences - continue. So too does the trend towards small, nuclear families. Single parents, unmarried couples, divorces 79/ and separations continue to become more commonplace as attitudes to marriage, cohabitation, and the role and status of women increasingly conform to international trends.

Family welfare services

411. Family support services include counselling, family casework, the home help service, the family aid service, psychological counselling, temporary shelters for battered women, compassionate rehousing for needy families, child day care services, and residential services for children. The essential criterion for support is that of need. These services are provided at 65 family service centres run by over 700 caseworkers (as at June 1998). In 1997-1998, caseworkers handled over 76,000 cases. These services will be expanded.

Children affected by family disputes

412. The position remains as described in paragraph 274 of the previous report. The Social Welfare Department provides counselling, assistance and

advice on matters relating to divorce, separation and child custody. The Matrimonial Causes Ordinance (chap. 179) and the Guardianship of Minors Ordinance (chap. 13) empower the Department's Child Custody Services Unit, on referral by the courts, to assist in disputes over child custody. The Unit also makes recommendations to the judge on custody, access arrangements, guardianship and maintenance. Should the court consider it desirable for the children of parties to guardianship proceedings to be placed under independent supervision or care, it may order that the children be placed under the supervision or care of the Director of Social Welfare. Caseworkers from the Child Custody Services Unit then undertake the necessary supervision.

413. Recognizing the need for family life education to prevent the breakdown of the family, the Government has steadily increased the number of family life education workers from 59 in 1991-1992 to 79 in 1997-1998. Twenty-two "Family activity and resource centres" provide families in need with their initial points of contact with social workers.

414. A sub-committee of the Law Reform Commission has been reviewing the laws on guardianship and custody. Its recommendations will be included in a consultation paper on the subject, which is at an advanced stage of drafting.

Post-divorce protection of spouses and children - the Marriage and Children (Miscellaneous Amendments) Ordinance

415. This Ordinance ("the Amendment Ordinance") was enacted in June 1997 to improve the protections offered to spouses and children in the aftermath of divorce and to remove certain legal anomalies, essentially:

(a) Gender-biased provisions: certain provisions in the Separation and Maintenance Orders Ordinance and Matrimonial Proceedings and Property Ordinance were biased against men. For example, the circumstances in which a husband might apply for separation or maintenance from his wife were different from those in which a wife could make such applications. These differences were removed to ensure equality of rights and responsibilities;

(b) Attachment of income orders: maintenance payees often faced difficulties in collecting maintenance payments. To address this problem, the Amendment Ordinance introduced new provisions 80/ for the attachment of income orders. Now if a maintenance payer defaults without reasonable excuse the court is empowered to issue an order of attachment to that person's income source. The order requires the income source (for example the payer's employer) to deduct the amount due from the payer's income and to pay the money deducted direct to the maintenance payee.

416. Attachment of income orders enable maintenance payees to collect payments regularly without having to interface with their maintenance payers. This is to avoid the difficulties that sometimes arise from such contacts. The fact that orders may be issued for the payment of maintenance to be drawn at source serves to make payers reflect carefully before defaulting.

Age limits for custody, supervision, care and maintenance orders for the benefit of children

417. Previously, there was no uniform upper age limit. For example, the age limit for care orders was 16 under the Guardianship of Minors Ordinance,

but 21 under the Matrimonial Causes Ordinance. The limit for maintenance orders was 18 under the Guardianship of Minors Ordinance, 21 under the Separation and Maintenance Orders Ordinance.

418. The Amendment Ordinance prescribed a standard upper age limit of 18, the age of majority. This now applies to all relevant orders under all relevant ordinances. Thus, the courts may now make custody, supervision, care or maintenance orders up to a child's 18th birthday. However, the courts retain flexibility in special circumstances in relation to maintenance orders. For example, they may order maintenance to be paid beyond a child's 18th birthday where the "child" will be undergoing education or training, or where there are special circumstances.

Amendments to the Matrimonial Causes Ordinance in 1995

419. In May 1995, as explained in paragraphs 280 and 281 of the previous report, the Matrimonial Causes Ordinance was amended to bring its provisions into line with prevailing attitudes towards divorce and to minimize the distress that divorce proceedings engender. The main amendments included reducing minimum separation periods before divorce petitions can be filed, shortening the time restrictions on divorce early in marriage and introducing a new procedure of divorce by joint application.

New arrivals from mainland China

420. In paragraphs 282 to 287 of the previous report, we explained that mainland China was Hong Kong's principal source of immigrants, over 90 per cent of whom came for family reunion. Entry was controlled by a quota system with a daily quota of 150 designed to ensure a rate of settlement that our resources could reasonably absorb. But the extent of demand was such that not all members of a family could obtain the necessary exit permits at the same time from the mainland authorities. This had led to the problem of "split families", which was mainly due to Hong Kong men marrying mainland women, who were, of course, subject to the quota system. The birth of children increased the numbers waiting in the "queue".

421. To expedite entry for family reunion, a special sub-quota of 48 places has been reserved (under the overall daily quota of 150) to enable mainland mothers to take with them a child aged under 14 when they enter Hong Kong for settlement. Nevertheless, some families continue to arrange for their children to enter Hong Kong illegally. When discovered, they are removed to the mainland, a practice that some commentators consider to be inhumane. But removal remains necessary both in justice to those waiting their turn in the queue and to preserve an orderly and manageable rate of entry. This issue is also discussed in paragraphs 238 to 246 above, in relation to article 12.

422. We also explained the measures devised to anticipate and contain the additional demand engendered by article 24 (3) of the Basic Law. 81/ That provision accorded right of abode in the HKSAR to children of Chinese nationality born outside Hong Kong who, at the time of their birth, had at least one parent who was a Hong Kong permanent resident of Chinese nationality. As at 1 July 1997, an estimated 66,000 mainland residents aged 20 or below qualified for the right of abode under the provision. To

expedite their entry, the sub-quota for them was increased from 45 to 60 a day from January 1998. Between 1 July 1997 and 30 June 1998, about 25,000 such persons entered Hong Kong for settlement.

423. Since the previous report was submitted, and as a result of the increased rate of migration, there has been a substantial increase in the number of new residents. Between 1 July 1995 (when the daily quota was increased) and 30 June 1998, some 159,500 people from the mainland have settled in Hong Kong. Many (some 20 per cent) cannot speak either Cantonese or English and so have difficulty in communicating with their neighbours, co-workers and schoolmates. The children have been educated in a different pedagogic tradition and are unfamiliar with the Hong Kong curricula. Adults often find that their qualifications are not recognized in Hong Kong. Together, these factors can result in disorientation, “culture shock” and other difficulties, such as in finding work or school places, particularly on first arrival.

424. Other difficulties arise from family circumstances. The (Hong Kong based) husbands are often less well-off than their mainland based families had expected. Their living conditions may have been adequate when they were single but, often, they are less than adequate for families with children. These difficulties, compounded by those described above, have in some cases led to family breakdown, domestic violence and spouse/child abuse.

425. The Government and NGOs are acutely aware of these matters and, together, have taken active steps to address them. New arrivals have access to the full range of welfare services, including counselling, day and residential child care services, financial assistance, and housing assistance where compassionate grounds apply. And as explained in paragraph 97 of the United Kingdom's third report on Hong Kong under the International Covenant on Economic, Social and Cultural Rights, the Government subvents the Hong Kong Branch of the International Social Service (ISS), to provide post-migration services such as: information and inquiry services; orientation sessions; short-term counselling and referral services. The ISS subvention is a long-standing arrangement (it began in 1972). But since 1996, following the decision to increase the rate of immigration, the Government has provided it with additional resources to strengthen its post-migration services.

426. The increase in the migration quota has posed special challenges in all the areas referred to in the previous paragraph and both the NGOs and the Government have seen the need for a coordination mechanism to ensure that the various programmes for new arrivals are coherently focused. To that end, in December 1995, the Government established the Coordinating Committee on New Arrival Services to monitor and assess the services for new arrivals from the mainland. It is chaired by the Director of Home Affairs. Its members are representatives of relevant government agencies and the Hong Kong Council of Social Services. They meet regularly to identify and examine the problems encountered by new arrivals 82/ and recommend measures for both the Government and NGOs to pursue. At the local level, the Committee's work is complemented by District Coordinating Committees on New Arrival Services in each of the 18 districts.

427. In January 1998, the Committee was further strengthened by the establishment of the Steering Committee on New Arrival Services. This is a

higher level body chaired by the Secretary for Home Affairs. It oversees the work of the Coordinating Committee and determines strategy for the provision of services.

428. Welfare planning naturally takes account of the anticipated numbers of new arrivals from the mainland. But social provision also comprises non-welfare services, such as education and employment. To assist new arrivals in these areas, the Government has:

(a) Established a central placement unit in the Education Department to oversee the provision of school places. Other initiatives in this area are discussed in the first report under the International Covenant on Economic, Social and Cultural Rights in relation to article 13 of that Covenant;

(b) Established an employment and guidance centre for new arrivals in the Labour Department to help new arrivals find employment. New arrivals also have access to the retraining courses offered by the Employees' Retraining Board, which again, is explained in the first report under the International Covenant on Economic, Social and Cultural Rights in relation to article 6 of that Covenant;

(c) Published the Service Handbook for New Arrivals to provide general information on life in Hong Kong and details of services available to new arrivals. The handbook is distributed free of charge to new arrivals upon their arrival in Hong Kong and is readily available at government outlets.

Article 24. Rights of children

429. Article 20 of BOR gives domestic effect to the provisions of articles 24.1 and 24.2 of the Covenant. That is:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
>
> Every child shall be registered immediately after birth and shall have a name.

Right to acquire a nationality (art. 24.3)

430. The Nationality Law of the People's Republic of China (NLPRC) is applicable to Hong Kong by virtue of article 18 of the Basic Law, the constitutional document of the HKSAR. Article 4 of NLPRC provides that any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. Article 6 provides that any person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.

Convention on the Rights of the Child

431. In June 1997, the Permanent Representative of China to the United Nations notified the United Nations Secretary-General of the continued application of the Convention to the HKSAR with effect from 1 July 1997 and

that China was assuming responsibility for the international rights and obligations arising from the application of the Convention to the territory. The former reservations and declarations under the Convention applicable prior to reunification continue to apply to the HKSAR. The HKSAR Government has continued to implement the Convention through its laws and through administrative measures.

432. The Committee's attention is drawn to the initial report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the Convention on the Rights of the Child, examined in October 1996. A supplementary "updating report" by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the Convention on the Rights of the Child was submitted in June 1997.

Day care services

433. Day crèches and day nurseries are available to parents who cannot care for their children during the day. There is an increasing need for these facilities and the Government has therefore continued to provide more places. Additionally, we have extended the operating hours of some child care centres and increased the number of places for occasional child care. 83/

434. As at 30 June 1998, there were 1,539 aided day crèches, 25,983 government and aided day nursery places and 690 occasional child care places. Currently, the average rates of enrolment are 94 per cent of capacity in respect of day nurseries, 77 per cent in respect of day crèches and 40 per cent in respect of occasional child care services.

Residential child care services

435. In paragraph 295 of the previous report, we explained that the residential child care service provides supervision and care for vulnerable children and young persons who cannot adequately be looked after by their families. Preference is given to non-institutional care in the form of foster homes or small group homes. The underlying principle is that children are best cared for in a home-like environment with support from family members and the community. Residential child care services include residential nurseries and crèches, children's homes, and boys' and girls' hostels and homes. Together, as at 30 June 1998, these provided 3,309 places. The average enrolment rate of residential child care services is 82 per cent of capacity. This form of service is kept under constant review and improvements are introduced as necessary.

436. The position in respect of out-of-home placement remains as explained in paragraph 296 of the previous report. That is, where necessary, legal guardianship is assumed by the Director of Social Welfare. In considering out-of-home placement, caseworkers conduct regular case reviews to safeguard the interests of children in care. When children are removed from their biological parents and cannot return home, the Director takes urgent steps to place them in the permanent care of responsible and caring extended family members or other relatives. Failing that, he seeks to find permanent homes through legal adoption.

Child abuse

437. As explained in paragraphs 9 and 201 of the initial report on Hong Kong under the Convention on the Rights of the Child, the Working Group on Child Abuse coordinates action against child abuse. The Working Group, chaired by the Director of Social Welfare, comprises legal practitioners, clinical psychologists, social workers, educationalists and medical practitioners. Its work is complemented by District Committees on Child Abuse that coordinate efforts to promote public awareness of the problem, and measures to deal with it, at the district level.

438. The Government's "Guide to the identification of child abuse" has been widely distributed to front-line professionals such as social workers, teachers, medical practitioners, child care centre staff and police officers. Talks, seminars and training programmes are organized to help these professionals identify the signs and symptoms of child abuse.

439. After each report of child abuse, a multi-disciplinary case conference meets to agree a long-term welfare plan for the child concerned. Again, participants include social workers, doctors, teachers, police officers. If the assessment is that the family is unable to provide care, or that the child will be at risk in the home, the child concerned will be placed in residential care. The welfare plan approved by the case conference will be considered by the court whenever an application for a care or protection order is sought.

440. In 1996, we introduced new procedures for handling child sex abuse cases, complementing the "Procedures for handling child abuse cases" (referred to in paragraph 301 of the previous report), which addressed all other forms of child abuse. Both sets of procedures are being updated and will be combined into a single, comprehensive volume with a view to improving coordination between the relevant agencies and disciplines. We expect to complete this in 1998.

441. The Government's media campaign seeks to raise public awareness of the issues and how to deal with them. Our aim is to encourage people to be alert to possible indications of child abuse and to assist our efforts to prevent it.

The Child Care Services Ordinance

442. In paragraph 290 of the previous report, we explained that the primary responsibility for the adequate care of children rested with parents. But the Government assisted disadvantaged and vulnerable children whose parents could not look after them. The law prescribed minimum standards of care, education and protection. For example, the Protection of Children and Juveniles Ordinance (chap. 213) defined the conditions under which children would be considered in need of care and protection and the Child Care Centres Ordinance (chap. 243) set standards and requirements for services provided by such centres.

443. In paragraph 299 of the previous report, we explained our intention to amend this Ordinance to prohibit unsuitable persons from acting as childminders and to improve the quality of care in child care centres. This was accomplished in September 1997 when the Child Care Centres Ordinance was retitled the Child Care Services Ordinance. This contains provisions that

enable the formation of mutual help child care groups, regulate childminding services and that aim to improve the quality of service in child care centres.

Child abuse as crime: the legal framework

444. The Government is committed to protecting victims of child abuse and to bringing offenders to justice. Laws that exist for the achievement of that aim include:

The Offences Against the Person Ordinance (chap. 212): this Ordinance contains provisions on exposure of a child to situations whereby his or her life is endangered, to ill-treatment or neglect by those in charge of a child or young person, and other violent acts causing or tending to cause danger to life and limb;

The Crimes Ordinance (chap. 200): Parts VI and XII contain provisions to protect children from sexual abuse.

445. The taking of evidence and the construction of victims' accounts of child abuse require particular sensitivity and skill and the police have established dedicated units to handle such cases. These are the Police Child Protection Policy Unit and the Child Abuse Investigation Units. These units take an interdisciplinary approach to their work, with the police, social workers and clinical psychologists working closely together to investigate the cases while seeking to minimize the trauma of both victims and their families. Sometimes, the child victim's first account of alleged abuse is videotaped. The officer involved in the interview is specifically trained for the purpose. The trauma of giving evidence in court is reduced by allowing the videotaped testimony to stand as the victim's evidence-in-chief and permitting the victims to testify or be cross-examined by live television link. Ongoing training programmes are organized for police officers to keep them abreast of procedures and developments and to sensitize them to the special needs of child victims.

Protection of children born out of wedlock

446. As explained in paragraph 292 of the previous report, the Parent and Child Ordinance (chap. 429) was enacted in 1993 to remove legal disadvantages that previously applied to children born out of wedlock. The Ordinance provides that, in all legislation and all future documents, whether private or public, references to relationships between two persons, for example “parent” and “child”, are construed without regard to whether they are illegitimate, unless a contrary intention is expressly stated. This entailed consequential amendments to other laws, including:

The Guardianship of Minors Ordinance (chap. 13): amended to enable either parent to apply for the same rights and authority over a child, whether or not the child is legitimate; and

The Intestates' Estates Ordinance (chap. 73): amended to enable the illegitimate issue of a person who dies intestate to enjoy the same rights as the deceased's legitimate issue.

Youth welfare

Financial assistance to children in need

447. As explained in paragraphs 297 and 298 of the previous report, families in financial difficulty and their children have access to assistance under the Comprehensive Social Security Assistance (CSSA) Scheme, subject to their meeting certain criteria. The rates for children are distinguished from and are generally higher than those for adults. They are higher still for children in poor health. As at 1 April 1998 (the beginning of the Government's financial year), the standard rate for an able-bodied child was $2,160 a month. The standard rates for children with disabilities varied between $2,510 and $4,670 a month, depending on their condition.

448. Additionally, the CSSA Scheme provides special grants for school fees, school-related expenses (text books, uniforms and so forth) and after-school care. There is also a meal allowance for children attending full-day schools.

Review of the Adoption Ordinance

449. The review of the Adoption Ordinance (para. 304 of the previous report) is now at an advanced stage. We will consult relevant organizations on the final recommendations in late 1998. Issues being examined include the right of adopted children to have access to records relating to their biological parents, the removal of any provisions in the Ordinance that may in any way be discriminatory, and the basic principles governing adoption practices.

Minimum age of criminal responsibility

450. The Juvenile Offenders Ordinance (chap. 226) provides that the minimum age of criminal responsibility is 7 years. As explained in paragraph 401 of the initial report of the United Kingdom in respect of Hong Kong under the Convention on the Rights of the Child, the Government has considered this age appropriate because:

(a) The majority of juvenile offenders aged below 10 years are effectively dealt with under the Police Superintendent's Discretion Scheme;

(b) In its view, children aged 7 years and above know when they have committed offences and therefore should be liable to punishment suitable for them;

(c) The Juvenile Offenders Ordinance adequately protects children from the full penalties of the law as they apply to adults; and

(d) Organized crime syndicates could exploit a rise in the age at which a child would be liable to prosecution by coercing or employing young children to act as thieves or drug-runners in the knowledge that they could not be prosecuted. The higher the age of criminal responsibility, the easier it would be for gangsters to exploit children. Those who use children to

commit crimes are themselves subject to prosecution if their guilt can be proven. But it is difficult to persuade children to admit to being so used because of the fear of retribution.

Nevertheless, commentators, including the Committee on the Rights of the Child, 84/ consider that the age should be raised.

451. In paragraph 46 of the United Kingdom's updating report under the Convention on the Rights of the Child (submitted in June 1997) it was explained that the Government was undertaking a comparative study of the age of criminal responsibility in different jurisdictions. That study concluded that there was a need for a comprehensive review at a higher level of expertise. The matter was therefore referred to the Law Reform Commission, which will review the issue and consider such reforms as may be necessary.

Children and armed conflict

452. Hong Kong has not been involved in armed conflict since the Second World War. Its defence is being undertaken by military forces stationed in the HKSAR by the Central People's Government (art. 14 of the Basic Law). There is no conscription and no question of minors taking part in armed conflict, the prospect of such conflict being, in any case, remote.

Article 25. Right to participate in public life

453. The political structure of the HKSAR is prescribed in chapter IV of the Basic Law. Article 26 of the Basic Law stipulates that permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with the law. In addition, article 21 of BOR, which corresponds to article 25 of the Covenant, guarantees the right and opportunity of every permanent resident to participate in public life.

Election of the Chief Executive

454. As explained in the revised core document of China (paras. 73-75), the Basic Law provides that the Chief Executive of the HKSAR is to be selected by election or through consultations held locally. In accordance with the relevant decision of NPC on 4 April 1990, the first Chief Executive was elected by a 400-member Selection Committee. All 400 were permanent residents of the HKSAR. They came from four broad sectors 85/ and represented a wide spectrum of interests in the community. They were elected by members of the Preparatory Committee from 5,789 applicants.

455. The Preparatory Committee was established in accordance with the relevant decision of NPC on 4 April 1990 to prepare for the establishment of the HKSAR, including the prescription of the method for the formation of its first government and the establishment of the Selection Committee for the election of its first chief executive. The committee was comprised of 150 members (mostly people from Hong Kong) appointed by the Standing Committee of NPC.

456. According to the Basic Law, the Chief Executive shall be a Chinese citizen who is a permanent resident of the Region aged not less than 40, has no right of abode in any foreign country and has ordinarily resided in Hong Kong continuously for at least 20 years. An eligible person could become

a candidate for election as Chief Executive if he or she was nominated by 50 members of the Selection Committee and the candidate who obtained an absolute majority of the votes cast would be elected. Altogether there were eight candidates in the election, which was conducted by secret ballot in December 1996. Mr. Tung Chee-hwa was elected and the Central People's Government accordingly appointed him Chief Executive.

Executive Council

457. As explained in the revised core document of China (paras. 76-77), the Executive Council assists the Chief Executive in policy making. Article 55 of the Basic Law provides that members of the Executive Council shall be appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislative Council and public figures. They must be Chinese citizens and permanent residents of the HKSAR with no right of abode in any foreign country. Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills into the Legislative Council, making subordinate legislation, or dissolving the Legislative Council. If the Chief Executive does not accept a majority opinion of the Executive Council, he/she shall put the specific reasons on record.

Provisional Legislative Council

458. As explained in the revised core document (paras. 83-84), the Provisional Legislative Council (PLC) was set up to enable the business of Government to continue before elections could be held to form the first Legislative Council of the HKSAR. There was a body of opinion which held that, because the Basic Law made no provision for a provisional legislative council, the Council had no legitimacy and its decisions/actions were therefore void.

459. The Government does not accept this view and, indeed, the Court has consistently ruled against legal challenges to the Council's standing. In HKSAR v. Ma Wai-kwan, David and Others [1997] HKLRD 761, the Court of Appeal held that the HKSAR courts, as regional courts, had no jurisdiction to question the validity of any legislation or acts passed by the Sovereign, as the Provisional Legislative Council was an interim body set up by the Preparatory Committee of NPC. But it was open to the HKSAR courts to examine the situation with regard to decisions of the Sovereign and decide whether such decisions had been properly implemented. On that basis, the Court of Appeal unanimously held that PLC had been legally established by the Preparatory Committee, which exercised the authority and powers conferred on it by NPC, and that its establishment had been ratified by NPC on 14 March 1997.

460. The Court of Appeal reached the same decision in the case of Cheung Lai-wah (May 1998). That case concerned the right of abode provisions in article 24 of the Basic Law as applied under the Immigration Ordinance. It is discussed in paragraphs 239 to 241 above in relation to article 12. The relevant provisions of the Immigration Ordinance were enacted by PLC and the appellant sought to overturn them by challenging the legitimacy of PLC and hence the legality of the provision in question. The Court of Appeal adhered

to its decision in the case of David Ma. The appellant has sought leave to appeal to the Court of Final Appeal.

The 1998 Legislative Council election

461. The first Legislative Council comprises 60 members returned by election on 24 May 1998. The election was conducted under the supervision of an independent statutory body, the Electoral Affairs Commission. A record 166 candidates stood for election and a record 1.49 million voters (53 per cent of the electorate) cast their votes. The elections were held in accordance with the relevant provisions of the Basic Law, the Legislative Council Ordinance (chap. 542), the Electoral Affairs Commission Ordinance (chap. 541) and the Corrupt and Illegal Practices Ordinance (chap. 288) and their subsidiary legislation.

462. As provided in the "Decision of the National People's Congress on the method for the formation of the first government and the first legislative council of HKSAR" adopted at the third session of the seventh National People's Congress on 4 April 1990, candidates for the first legislative council of the HKSAR were returned in three types of constituency: the geographical, the functional and the Election Committee. The electoral arrangements for each of these were the following:

Geographical constituencies

Twenty members were returned by direct elections based on universal suffrage;

Votes were cast under a form of proportional representation known as the "list voting system". Details of the list voting system are set out in annex 18; and

All permanent residents of the HKSAR who had reached the age of 18 or above were eligible to be registered and to vote. Some 2.8 million people, 70 per cent of those eligible to do so, registered as electors. This is the highest in Hong Kong's electoral history, both in terms of number and percentage;

Functional constituencies

These returned 30 members. As explained in paragraph 34 of the supplementary report, the functional constituency system was introduced into Hong Kong in 1985. The 1998 constituencies ensured a balanced representation of the professional, financial and economic sectors;

Election Committee

The Committee returned 10 members. Its 800 members were permanent residents of the HKSAR representing a wide range of community interests. Most were returned in an election held on 2 April 1998 under the supervision of the Electoral Affairs Commission. Exceptions were the representatives of the religious subsector (who were returned by nomination) and the ex officio members of the Election Committee (who were the Hong Kong deputies to NPC and members of PLC).

463. Article 67 of the Basic Law provides that permanent residents of the HKSAR who are not of Chinese nationality or who have the right of abode in foreign countries may become members of the Legislative Council if elected, subject to their number not exceeding 20 per cent of the total membership of the Council. The 12 seats concerned were allocated to the 12 functional constituencies designated for this purpose under section 37 of the Legislative Council Ordinance. These arrangements ensure that no more than 12 seats can be won by this group of candidates.

464. Commentators have said that:

(a) The election system is inconsistent with the requirements of article 25 (a) and (b). The comment overlooks the reservation taken out against this provision when the Covenant was extended to Hong Kong. We are mindful of the Committee's view on the scope of this reservation (para. 19 of its concluding observations on the previous report). But we respectfully disagree with that assessment and maintain the view expressed in the supplementary report that our electoral system is appropriate to Hong Kong's circumstances and gives rise to no incompatibility with any of the provisions of the Covenant as it applies to Hong Kong; and

(b) The functional constituencies give undue weight to the business community and discriminate among voters. This reflects comments made by the Committee in its concluding observations on the previous report. We respectfully maintain the position set out in paragraph 34 of the supplementary report that functional constituencies provide a representative voice for the territory's economic, financial and professional sectors, reflecting their importance in the community. These constituencies and the system of election to them, have served Hong Kong well and they will continue to do so. Nevertheless, they are transitional. The ultimate aim, as provided for in article 68 of the Basic Law, is the election of all members of the Legislative Council by universal suffrage.

465. The Committee also expressed the concern that laws depriving convicted persons of their voting rights for periods of up to 10 years might be a disproportionate restriction of the rights protected by article 25. We are pleased to advise the Committee that the disqualification criteria have since been amended. Sections 31 and 39 of the Legislative Council Ordinance now provide that a person convicted of specified offences or sentenced to a certain period of imprisonment shall be disqualified from being an elector for three years 86/ and from being a candidate for five years.

Electoral Affairs Commission

466. The Electoral Affairs Commission, established in September 1997, is an independent statutory body whose role is to supervise the conduct of Legislative Council elections and elections of district organizations. Its task is to ensure that elections are conducted openly, fairly and honestly. It also makes recommendations to the Chief Executive on the delineation of geographical constituencies for the elections, draws up regulations and guidelines on voter registration, makes practical arrangements for the elections, supervises the conduct of elections and handles election-related complaints. The members of the Commission were appointed by the Chief Executive. Its Chairman is a High Court judge. It has two other members, both of whom are politically neutral.

467. To ensure the transparency of the electoral process of the 1998 Legislative Council election, candidates and their agents were allowed to observe the conduct of the poll inside the polling stations and the counting process inside the counting stations. A substantial publicity campaign was conducted before the election to familiarize the public with the electoral arrangements. The international and local media were also briefed in detail on the arrangements.

Provisional District Boards, Provisional Regional Council and Provisional Urban Council

468. Article 97 of the Basic Law provides that district organizations which are not organs of political power may be established in the Hong Kong Special Administrative Region, to be consulted by the Government of the Region on district administration and other affairs, or to be responsible for providing services in such fields as culture, recreation and environmental sanitation. Article 98 further stipulates that the powers and functions of the organizations and the method for their formation shall be prescribed by law.

469. District organizations (the Municipal Councils and the District Boards) are channels for public participation in community affairs. The former Municipal Councils and District Boards established under British rule were dissolved on 30 June 1997.

470. As explained in the revised core document of China (paras. 85-86), on 1 February 1997, in preparation for the establishment of the Hong Kong Special Administrative Region, the Preparatory Committee decided that the HKSAR Government should set up provisional district organizations 87/ on 1 July 1997, before elections to form the first district organizations of the Region. The members of these provisional bodies were appointed by the Chief Executive. Their term of office will end no later than 31 December 1999.

471. The 18 Provisional District Boards have a total of 468 members. These include all 373 members elected to serve in the former District Boards and 95 new members.

472. The main function of the Provisional District Boards is to tender advice to the Government on matters affecting the interests or well-being of the districts, the provision and use of public services and facilities within the districts, and the adequacy and priorities of government programmes for the districts. Advice on territory-wide issues is also sought. Funds are provided for the Boards to undertake minor environmental improvement projects and to promote recreational and cultural activities within the district.

473. The Provisional Urban Council and Provisional Regional Council each have 50 members. These include all elected members of the former Urban Council and the Regional Council. In addition, nine new members were appointed to the Provisional Urban Council and 11 to the Provisional Regional Council.

474. The two Councils provide a wide range of services at the regional level. These include environmental and food hygiene, parks and rest areas, cultural activities (exhibition, performances and so forth), courses in a large selection of sports and other recreational activities. They also provide the

facilities necessary for these services. Within the resources available, the Councils have full autonomy in determining their own budgets and in setting priorities for their programmes.

Review of district organizations

475. The Government is reviewing the structure, functions, composition, and financial arrangements of the Municipal Councils and the District Boards. The objectives are to identify how the functions of the district organizations, particularly the Municipal Councils, should best be performed; to enhance public accountability and cost-effectiveness in the use of public funds; to propose changes to the present structure of district organizations to reduce duplication of effort and to improve efficiency; and to maintain district identity and strengthen public participation in public affairs.

476. In June 1998, we issued a consultation document inviting public views on the options for change. The consultation period ended in late July 1998. As at the time of drafting the present report, we are assessing the response. A decision on the future structure and functions of district organizations is expected to be made in October 1998. Any changes could entail introducing new or amending existing laws in the Legislative Council. We aim to hold the elections for the district organizations in late 1999, before the terms of office of the "provisional members" expire.

Government advisory boards and committees

477. As explained in paragraphs 334 to 335 of the previous report, the network of government advisory boards and committees is a distinctive feature of the Hong Kong system of government. Their purpose is to advise the Government on issues ranging from fundamental livelihood matters to highly specialized and technical subjects. There are at present over 350 of these bodies. Some are statutory, others not. Their members include both government officials and more than 3,500 members of the public. Some individuals serve on more than one body.

Appointment and transparency measures

478. Members are appointed to these bodies on the basis of individual merit, account being taken of their personal abilities, expertise, experience, integrity and commitment to public service. The Government's objective is to ensure appointment of the persons best able to meet the needs of the bodies concerned. The Government encourages an inflow of new ideas through a reasonable turnover of membership and, where appropriate, seeks opportunities to broaden cross-sectional representation.

479. The Government encourages the advisory bodies to inform the public of their work and to open their meetings to public attendance insofar as that is compatible with the nature of the work itself. 88/ Increasingly, information is being made available for public inspection in accordance with the Code on Access to Information. 89/ The agenda, notice of meeting and operational rules are being uploaded onto the Internet. So too is background information on members of the bodies, such as their profession, public service record and so forth.

Access to public service

480. Article 99 of the Basic Law provides that, with the exception of the provisions regarding foreign nationals in article 101, public servants must be permanent residents of the Region. Article 101 provides that the Government of the HKSAR may employ foreign nationals previously serving in the public service in Hong Kong, or those who have become permanent residents of the HKSAR, to serve as public servants in government departments at all levels, except the principal official posts (23 posts at present), which should be filled by Chinese citizens among permanent residents of the HKSAR with no right of abode in any foreign country. It also provides that "the Government may employ foreign nationals as advisers to government departments and, when required, may recruit qualified candidates from outside the HKSAR to fill professional and technical posts in government departments".

481. Otherwise, access to the public service on general terms of equality is open to all suitably qualified persons. Recruitment is based on open and fair competition. Candidates who meet the specified entry requirements (which, in turn, are based on qualifications and experience) may apply and compete for vacancies.

Localization policy

482. As explained in paragraphs 337 to 340 of the previous report, the Government seeks to ensure that the public service is staffed primarily by officers whose roots are in, and who have a sense of commitment to, Hong Kong. Overseas candidates are considered only when no qualified and suitable local candidate is available. New entrants are recruited on "local" or "overseas" terms according to their time of appointment, habitual residence, general background and social ties, and potential dislocation or uprooting. Race and nationality are not considered: there are officers on local terms who are foreign nationals and officers on overseas terms who are ethnically Chinese. Officers on overseas agreement terms who have become permanent residents may apply for transfer to local terms. Once so transferred, they serve on the same terms and conditions as all other officers serving on those terms.

The "AECS" case

483. Some of the arrangements for transfer from overseas to local terms have been challenged by the Association of Expatriate Civil Servants of Hong Kong (AECS). The Court noted that there was no suggestion that the localization policy was in itself unlawful and ruled that several aspects of the arrangements were legitimate. But it ruled that certain arrangements for transfer 90/ were incompatible with BORO. The Government of the HKSAR has rectified those arrangements.

Article 26. Right to equal protection before the law

484. Article 25 of the Basic Law guarantees that all Hong Kong residents shall be equal before the law. Additionally, article 22 of BOR gives domestic legal effect to the provisions of article 26 of the Covenant. Some commentators consider that this provision requires the enactment of legislation against all forms of discrimination. Indeed, as explained in paragraph 354 of the previous report, BORO meets that requirement in respect

of actions between the citizen and the State. However, calls continue for the extension of such protection to activities between private citizens.

485. As indicated in paragraph 17 of the supplementary report, we have carefully considered the recommendation in paragraph 23 of the Committee's concluding observations on the previous report that comprehensive anti-discrimination legislation be adopted, aiming at eliminating all forms of discrimination prohibited under the Covenant (and not already prohibited by existing Hong Kong law).

486. As explained in paragraph 18 of the supplementary report and in paragraph 30 of the United Kingdom's final report, the Hong Kong Government fully supports the principle of equal opportunities and is committed to the elimination of all forms of discrimination.

487. BORO does indeed already prohibit discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. But while BORO binds the Government and public authorities, it does not regulate relations between private persons. In particular, it does not protect one person from being discriminated against (as described above) by another person. This is because it has been considered that the protection of the rights of one person against infringement by another is best achieved through specific legislation, i.e. legislation aimed at a specific and established abuse. In the particular field of protection against discrimination, the enactment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance in 1995 are instances of specific legislation introduced where a need for such legislation, and widespread community support for it, had been shown to exist.

488. As noted in the supplementary report, anti-discrimination legislation is a new area of law in Hong Kong which has far-reaching implications for the community as a whole. The Hong Kong Government accordingly maintains its view that a step-by-step approach, allowing both the Government and the community thoroughly to assess the impact of such legislation in the light of experience offers the most suitable way forward.

Measures against discrimination

489. The issues of sex discrimination and equal opportunities for women and men are discussed in paragraphs 69 to 73 above in relation to article 3. This section discusses the measures taken in relation to discrimination on other grounds.

Disability discrimination

490. Paragraphs 349 and 350 of the previous report explained the Government's intention to introduce legislation outlawing discrimination on the ground of disability. That undertaking was duly fulfilled when the Disability Discrimination Ordinance came into full operation in December 1996. This provides the legal means to ensure equal opportunities for people with disabilities so as to facilitate their integration into the community to the fullest extent possible. The Ordinance gives people with disabilities and their associates the legal means to fight for equal opportunities and to fight against discrimination, harassment and vilification. It is now unlawful to

vilify people with disabilities, or their associates. It is also unlawful to discriminate against or harass people with disabilities and their associates in relation to:

Employment matters ranging from recruitment to in-service matters;

Membership of trade unions, qualifying bodies, clubs and access to partnerships;

Education;

Access to premises;

Provision of goods, services and facilities;

Accommodation;

Sporting activities; and

Exercise of government powers and performance of its functions.

491. The Equal Opportunities Commission (see paras. 28-30 above in relation to article 2) implements and enforces the provisions of the Ordinance. In December 1996, the Commission issued the Code of Practice on Employment under the Ordinance to provide guidance on the procedures and systems that can help to prevent disability discrimination, harassment and victimization in employment. Through its complaint handling mechanism, the Commission provides assistance for people with disabilities who have experienced discrimination, harassment or vilification. On receipt of complaints, the Commission initiates investigations and encourages conciliation between the parties. If the complaint cannot be resolved, the Commission may provide other forms of assistance, such as legal advice or legal assistance in proceedings should the aggrieved persons take their cases to court. The Commission also undertakes public education and research programmes to promote equal opportunities for people with disabilities.

Education for disabled children

492. As explained in paragraphs 342 to 343 of the previous report, all children, irrespective of their degree of disability, receive at least the statutory nine years free and compulsory education. As far as practicably possible, disabled children are encouraged to receive education in ordinary schools. To help them integrate into such schools, the Education Department provides support services, such as remedial teaching, peripatetic advisory services and counselling. 91/

493. However, not all disabled children are able to benefit from education in ordinary schools, even with special support. Some 62 special schools cater for the needs of nearly 7,500 such children (1997/98 academic year).

Access and transport

494. In 1993, the Commissioner for Transport established a working group on access to public transport by disabled persons. This comprises representatives from relevant government departments, major public transport

operators and the disabled community. Since its inception, it has provided a forum for the consideration of measures to improve public transport facilities for persons with a disability. Its work has resulted in the improvements listed in annex 19.

(a) "Add value" machines for "Octopus" cards

495. "Octopus" cards are "smart-card" tickets which can be used by passengers of railways and certain bus and ferry routes. Passengers can "recharge" these cards at customer service centres or Octopus "Add value" machines at railway stations. Some commentators have said that the machines are not user-friendly for disabled people. In April 1998, after consulting local disabled groups, the company that operates the Octopus ticketing system installed a trial "Add value" unit fitted with braille plates at a selected station. This was well received by disabled groups and all "Add value" machines will be fitted with braille plates by the end of 1998.

(b) Powerphones

496. Commentators have said that the new "Powerphones" (touch-screen payphones) that have been installed at railway stations are difficult for disabled people to use. That is, they are too high for people in wheelchairs and the touch-screens present difficulties for the visually impaired.

497. Of the 592 payphones at railway stations, 236 are Powerphones which are touch-screen operated. The remaining 356 are conventional button-operated telephones equipped with facilities for the visually impaired. To cater for wheelchair users, at least one payphone at each railway station is installed at a lower height. In addition, the operator of the Powerphones plans to develop "smart-cards" for the visually impaired. These will connect the telephone line to an operator who will then on-connect the call for the user.

(c) Social security

498. Severely disabled persons receive a non-means-tested disability allowance. Those who require constant support at home receive a higher allowance equivalent to twice the amount of the standard disability allowance.

Discrimination on the ground of family status

499. In paragraph 13 of its concluding observations on the previous report, the Committee expresses concern at the absence of legislation to prohibit discrimination on the ground of family responsibility. In 1996, in accordance with the "step-by-step" strategy explained in paragraph 354 of the previous report, the Government undertook a study of, and public consultations on, this issue. It concluded that the problems identified would best be addressed through legislation. Accordingly, the Family Status Discrimination Ordinance was enacted in June 1997 and came into operation in November that year. It outlaws discrimination against persons who have responsibility for the care of immediate family members in areas of life similar to those in the Sex Discrimination Ordinance. As at 30 June 1998, the Equal Opportunities Commission had received 164 inquiries and 5 complaints in respect of this form of discrimination.

Eliminating age discrimination in employment

500. Commentators have expressed the concern that older workers, 92/ particularly older women, are disproportionately affected by economic restructuring and have greater difficulty than others in finding new jobs.

501. In August 1996, with a view to establishing the facts, we initiated public consultations to ascertain whether age discrimination was a problem; if so, its nature and extent; and to determine the way forward for tackling such problems as might be identified. The public expressed divergent views and we accordingly considered it prudent and appropriate to address the issues through a sustained programme of publicity, public education and self-regulation. Since then, we have launched a series of publicity programmes and, in February 1998, published guidelines to help employers eliminate discrimination in the workplace. The guidelines address key phases of the employment process, including recruitment, advertising, employment agency services, selection, promotion and so forth. A copy of the guidelines is provided in Annex 20. Additionally, the Labour Department ensures that employers placing vacancy orders with the Department's Local Employment Service 93/ do not impose restrictive age requirements.

502. Some commentators have maintained that the consultation findings lacked objectivity. But data from other sources indicate that discrimination against older workers is not the problem that some believe it to be. Statistics published by the Census and Statistics Department (annex 21) indicate that in the first quarter of 1998 the unemployment rates for the 30 to 39 and 40 to 49 age groups were respectively 2.3 and 2.9 per cent. The rate for workers aged 20 to 29 was 3.8 per cent. These figures do not suggest that the position of older workers is worse than that of younger ones. Nor are women worse off than men: the first quarter rate was 1.7 per cent for women aged 30 to 39 and 2.3 per cent for those aged 40 to 49. The corresponding rates for men in the same age groups was 2.7 and 3.3 per cent respectively.

503. These indications have been confirmed by the experience of the Labour Department's conciliation service. At the time of finalizing this report, the Department had received only one complaint in relation to a claim of discrimination on the ground of age.

Protection of people of different sexual orientation and racial minorities

504. In June 1996 and June 1997, with the object of establishing whether discrimination on the grounds of sexual orientation and race existed and, if so, their nature and extent, we conducted discrete studies and consultations on these forms of discrimination. In both cases, over 80 per cent of respondents were opposed to anti-discrimination legislation. But there was unanimous support for the use of educational means to address the issues.

505. Accordingly, we are spending some $7 million over the two years 1997 to 1999 on measures to promote equal opportunities, particularly in these two areas. Those measures include extensive publicity programmes, community participation projects and discrete codes of practice for employers and employees. The codes are similar to that in relation to age.

506. Commentators have said that this approach ignores the need to protect minorities from discrimination on the part of the majority. Indeed, our

practice of consultations is, it is said, at fault for pandering to "majoritarian" views. It is also said that, by not legislating against these forms of discrimination, we are failing to meet our obligations under article 26 of the Covenant and articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

507. We agree that Governments should protect minorities from discrimination. This is a fundamental principle of BOR which binds public bodies, the Government and their agents. It is also true that Governments must sometimes take the lead, ahead of popular consensus. But, in our view, they must also be attentive to the climate of public opinion. A balance must be struck between conflicting pressures and judgements made about what is appropriate at particular times in particular places. Legislation with wide-reaching social implications requires the support of the community or it will not be effective. This is particularly true of anti-discrimination legislation, which intimately impinges on the daily lives of ordinary people. The public consultations in regard to race clearly indicated that the Government could not look for adequate community support for legislation in that area, at least for the time being. Fears were expressed that the introduction of such legislation could engender resentment on the part of the majority, to the detriment of the minorities for whose benefit it was intended. Hong Kong, it was felt, was a cosmopolitan city whose citizens were well aware that their own best interests lay in establishing and maintaining good relations with all peoples and all races. They did not need legal compulsion towards that end.

508. Our minds are not closed and we shall keep the situation in view. But, pending any significant change of circumstances, we will persist with our efforts to raise public consciousness of the issues and, through continuing educational initiatives, gradually to foster a culture of mutual understanding, respect and tolerance.

Prosecution policy of the Department of Justice

509. Having regard to the provision of this article that "all persons are equal before the law", some commentators have questioned the propriety of a decision by the Secretary of Justice not to proceed with prosecution in a recent criminal case allegedly involving a famous personality. The Secretary's decision was made in accordance with established prosecution policy as described in the following paragraphs.

510. Article 63 of the Basic Law provides that the Department of Justice shall control criminal prosecutions free from any interference. In making a prosecutorial decision, the Secretary for Justice acts in a quasi-judicial capacity and does not take orders from the Government or any law enforcement agency. It has never been the Government's responsibility to prosecute. The law enforcement agencies conduct investigations. Once those are complete, the Secretary for Justice decides whether to prosecute and, if so, conducts the case. This separation of functions ensures that an independent and objective judgement is applied to the case as prepared by the law enforcement bodies (the Commissioner of Police, the Commissioner of ICAC, the Director of Immigration or the Commissioner of Customs and Excise, and so forth).

511. In deciding whether to initiate a prosecution, the Department of Justice follows the guidelines in the booklet “Prosecution policy: guidance for government counsel”. It was issued by the former Attorney-General in 1993 and updated in 1998.

512. The guidelines provide that there must be enough evidence to prove all the elements of an offence. A bare prima facie case is, generally speaking, insufficient to warrant prosecution. There must be a reasonable prospect of securing a conviction, because it is not in the interests of public justice, nor of the public revenue, that weak or borderline cases should be prosecuted. In evaluating the evidence, the prosecutor must have regard to such matters as admissibility of evidence, the credibility of witnesses, conflict of evidence, the impression witnesses are likely to make on a judge or a jury, the lines of defence that are open to the accused, and so on. The prosecutor will need to bear many matters in mind, including the fact that evidence that is admissible against one suspect may not be admissible against another. For example, the written confession of an accused person may not be used to implicate another accused.

513. The second criterion is the public interest. Regard must be had to the effect that the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and any other considerations affecting public policy.

514. The prosecutor must consider other factors, such as the surrounding circumstances of the offence; its seriousness; its practical effects; extenuating circumstances, if any; the possible effect of a decision to prosecute on other people; how the court might view the offence if there were a conviction; and so forth.

515. The policy of not disclosing the reasons for any prosecution decision is a long-standing one that has been consistently applied in Hong Kong. The policy was not created for the convenience of the Secretary for Justice. The approach is firmly embedded in English practice, and is reflected elsewhere in the common law world. It was formulated to safeguard the integrity of the criminal justice system and to protect the legitimate interests of those caught in that system. It is to ensure that the safeguards provided for defendants in criminal trials (the presumption of innocence, right of cross-examination; requirement of proof beyond reasonable doubt) are not disregarded in the course of non-judicial inquiry.

Article 27. Rights of minorities

Legal protections

516. At the constitutional level, article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. The second paragraph of article 32 of the Basic Law provides that Hong Kong residents shall have freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public. And article 38 provides that Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the HKSAR. Additionally, article 23 of BOR gives domestic legal effect to article 27 of the Covenant.

Representation in elected bodies

517. Article 26 of the Basic Law provides that all Hong Kong permanent residents shall have the right to vote and the right to stand for election in accordance with the law. As explained in paragraph 463 above (under article 25), permanent residents who are foreign nationals or who have the right of abode in foreign countries are eligible to stand for election of the Legislative Council in 12 designated functional constituencies. In the first Legislative Council election held in May 1998, there were 16 such candidates and 6 of them were elected.

518. Non-Chinese permanent residents who wish to acquire Chinese nationality in order to stand for election to the Legislative Council may do so in accordance with the Nationality Law of the People's Republic of China (NLPRC) 94/ and the "Explanations of some questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region". Article 7 of NLPRC provides that foreign nationals or stateless persons who are willing to abide by China's Constitution and laws and who meet one of the following conditions may be naturalized upon approval of their applications:

They are near relatives of Chinese nationals;

They have settled in China; or

They have other legitimate reasons.

Article 8 provides that any person who applies for naturalization as a Chinese national shall acquire Chinese nationality upon approval of his application; a person whose application for naturalization as a Chinese national has been approved shall not retain foreign nationality.

519. Before the reunification, all permanent residents of Hong Kong, irrespective of their race, were eligible to stand for elections of the district organizations (Urban Council, Regional Council and District Boards). As explained in paragraph 471 above, all the elected members of these bodies subsequently became members of the Provisional Urban Council, Provisional Regional Council and Provisional District Boards. The term of office of these members will expire at the end of 1999. The Government will formulate a legislative proposal for the election of district organizations in 1999 in accordance with the relevant provisions in the Basic Law.

Opportunities of ethnic minorities to learn their mother tongue

520. The Government runs two primary schools and one secondary school which offer other languages to English-speaking minorities. The normal medium of instruction is English. But other languages, such as Hindi, Urdu and French, are taught as subjects. Additionally, 45 international schools offer education in 10 different national curricula, such as those of the United Kingdom, France, Germany, the Republic of Korea, Canada, Japan, Singapore, Australia, Indonesia and the United States of America. Many of these schools receive government assistance, such as land grants, and/or other forms of financial assistance, such as capital loans and/or recurrent subsidies. 95/

The language of Government

521. Paragraphs 369 and 370 of the previous report discussed the use of Chinese and English in the official context. Strictly speaking, this was not an issue that concerned the rights of minorities and its discussion under article 27 was, perhaps, misplaced. It was included here because of concerns in the community that the system did not give adequate recognition to Chinese, the language of some 96 per cent of Hong Kong's people.

522. The official languages of the HKSAR are Chinese and English. Article 9 of the Basic Law stipulates that

> "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region."

523. The Official Languages Ordinance states that both languages may be used for communication with the Government. Major government reports and publications of public interest are available in both languages. Simultaneous interpretation services are provided at meetings of the Legislative Council, the Provisional Municipal Councils, the Provisional District Boards, and other government boards and committees.

524. In paragraph 370 of the previous report, we explained that since April 1989 all new principal legislation and legislation amending bilingual ordinances had been enacted in both Chinese and English. As at 30 June 1995, over 350 of the 525 ordinances originally enacted in English only had working Chinese drafts. Of these, 225 had been examined by the Bilingual Laws Advisory Committee and 109 had been declared authentic. We are pleased to inform the Committee that the translation project was completed in May 1997. The laws of Hong Kong are now completely bilingual. The Chinese and English texts are equally authentic.

525. The Official Languages Ordinance also provides for the use of both official languages in judicial proceedings. Accused persons, litigants and witnesses in Hong Kong courts have always had the right to use whatever language they wish, with interpretation provided if necessary. But there have been restrictions on the use of Chinese by the courts and legal representatives. Those restrictions were fully removed by mid-1997 and a fully bilingual system is now in place. Either or both languages can be used by all parties in judicial proceedings.

Article 40. Submission of report

526. In compiling this report, the Government sought the views of legislators, NGOs and interested members of the public.

527. In accordance with established practices, the method of consultation was to publish an article-by-article outline of the topics that we proposed to cover. Respondents were asked to comment on the implementation of the Covenant in relation to these topics and to draw attention to any additional issues that they considered we should include. We have addressed their comments as appropriate in the sections relating to the relevant articles.

528. The consultations took place between March and April 1998 over a period of five weeks. During that period, the Government drafting team met NGOs and others to discuss the issues and to exchange views on the consultation process. Again in accordance with established practices, the report will be published, in bound, bilingual format, after its submission to the Committee.

Notes

1."Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region", paragraph 6 of which provides that the Chief Executive shall be selected in accordance with the "Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR". That, in turn, provides that the first Chief Executive shall be selected by a broadly representative Selection Committee, composed of 400 members.

2."The previous report" refers to the fourth periodic report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong, submitted in July 1995.

3.As explained in paragraphs 100 to 102 of the revised core document of China the first paragraph of article 39 of the Basic Law provides that the provisions of the two International Covenants on Human Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The second paragraph of article 39 provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law, and that such restriction shall not contravene the provisions of the preceding paragraphs.

4.Section 7 of BORO states that the Ordinance binds only the Government and all public authorities; and any person acting on behalf of the Government or a public authority.

5.The Committee on the Elimination of Racial Discrimination made the same recommendations in its concluding observations on the United Kingdom's thirteenth report under the International Convention on the Elimination of All Forms of Racial Discrimination (examined in March 1996). The Government responded to that recommendation in paragraph 6 of the fourteenth report, which was examined in March 1997. That response was substantially as above.

6.SDO is discussed in paragraphs 69 to 73 of the present report in relation to article 3. PDPO is discussed in paragraphs 310 to 316 in relation to article 17. DDO and FSDO are discussed in paragraphs 490 to 499 in relation to article 26.

7.Here and throughout this report "the supplementary report" refers to the supplementary report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the International Covenant on Civil and Political Rights examined by the Committee in October 1996.

8.He does, however, have jurisdiction over the police and ICAC in respect of the administrative Code on Access to Information.

9.Paragraph 48 of the final report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the International Covenant on Civil and Political Rights submitted by the United Kingdom on 30 June 1997 (CCPR/C/125).

10.In this context, “endorsed” means that, having examined the findings of CAPO investigations, IPCC agrees with them. If it does not, the Council can ask CAPO to clarify areas of doubt or to reinvestigate the complaint.

11.Articles 1 and 21 of BOR provide respectively for the equal enjoyment of all rights recognized in BOR and the enjoyment by permanent residents without distinction of the right to participate in public life. Articles 25 and 26 of the Basic Law respectively provide for equality before the law, and the right of permanent residents to vote and stand for election in accordance with law. Article 39 of the Basic Law provides that the protection of the provisions of the International Covenants on Human Rights as applied to Hong Kong shall remain in force.

12.At the time of finalizing the present report, concerns were being expressed that admission to secondary schools is biased against girls. While not all educationalists agreed that this was the case, the Education Department is now investigating the matter. The Equal Opportunities Commission will also look into the matter. Should they discover that such bias exists, measures will be taken to rectify the situation.

13.In this connection, article 18 of the Basic Law provides that “In the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People’s Government may issue an order applying the relevant national laws in the Region”.

14.The Committee will recall that, in paragraph 51 of the previous report, we explained that, following a review of the Emergency Regulations Ordinance in relation to BORO, the Government had repealed all former subsidiary legislation under that Ordinance. This was because many of the regulations, some of which dated back to the Second World War, were anachronistic and inconsistent with BORO (and therefore with the Covenant).

15.In June 1997, China's Permanent Representative to the United Nations notified the United Nations Secretary-General of the continued application of the Convention in the HKSAR with effect from 1 July 1997 and that the Central People's Government was assuming responsibility for the international rights and obligations arising from the application of the Convention to the Region.

16.Officers of the Director of Public Prosecutions.

17.This replaced the United Kingdom Extradition Act 1989 and the Fugitive Offenders Act 1967 as extended to Hong Kong by Orders in Council.

18.There are circumstances where video recording is not feasible or facilities are not available. For example, a suspect may speak at the scene of crime when no recording facilities are available and the record can only be made in an officer's notebook.

19.The Tribunal's power to discharge a person from a mental hospital or the Correctional Services Department Psychiatric Centre does not apply to persons who are serving sentences of imprisonment in pursuance of court orders and who are liable to be detained in a mental hospital or the CSD Psychiatric Centre during the period of that sentence, except when the person is detained at the discretion of the Chief Executive (sects. 59 B (1) and 59 E of the Mental Health Ordinance (cap. 136)).

20.The major indication for use of ECT is in cases of severe depressive illness. To a lesser extent it is also indicated for patients with mania or schizophrenia, especially as an adjunct to neuroleptic treatment when response to medication has not been satisfactory.

21.See paragraph 14 (f) of the concluding observations on the third report of the United Kingdom of Great Britain and Northern Ireland under the International Covenant on Economic, Social and Cultural Rights (examined in November 1996); also paragraph 21 of the concluding observations on the 14th report of the United Kingdom of Great Britain and Northern Ireland under the International Convention on the Elimination of All Forms of Racial Discrimination (examined in March 1997).

22.The rights and freedoms of non-residents are guaranteed under article 41 of the Basic Law (full text in annex 1).

23.In recent years, most applications have involved Vietnamese migrants. A single application can cover many persons.

24.These do not include the “Ex-China Vietnamese” discussed in paragraphs 173 to 177.

25.The 20,000 non-refugees then in Hong Kong accounted for more than half the total number of non-refugees in the Region.

26.The HKSAR government representative attended as a member of the delegation of the People's Republic of China.

27.One hundred and sixteen families had been detained under Part III A of the Immigration Ordinance and so had been screened in accordance with the Privy Council’s ruling. The remaining three families arrived after 1 September 1995 and were not detained under Part III A; rather, they were detained under the “normal” powers of detention in Part VII of the Ordinance.

28.That is, in addition to orders for detention in mental hospitals.

29.Section 59 ZA in Part IV C of the Amendment Ordinance defines “special treatment” as “medical treatment or dental treatment or both of an irreversible or controversial nature”.

30.The Prison Rules made under section 25 of the Prisons Ordinance (chap. 234).

31.The Prison (Amendment) Rules 1997.

32.There are a few exceptions, for example, proceedings under the Insurance Companies Ordinance (chap. 41) relating to a person's suitability to be authorized as an insurer.

33.The categories comprised those who were subject to probation orders or reformatory school orders; those who had been cautioned under the Police Superintendents' Discretionary Scheme; and those referred by social outreach workers, school social workers or family caseworkers.

34.Research on the effectiveness of rehabilitation programmes for young offenders, conducted by the City University of Hong Kong on behalf of the Standing Committee on Young Offenders of the Government’s Fight Crime Committee.

35.Article 48 of the Basic Law prescribes the powers and functions of the Chief Executive. One of these, provided under article 48 (12), is the power to pardon persons convicted of criminal offences or commute their penalties.

36.For example, those convicted for triad-related offences, sexual offences or crimes of violence.

37.Justices of the peace are appointed by the Chief Executive under the Justices of the Peace Ordinance (chap. 510). People so appointed are persons of integrity and social standing who are able and willing to carry out the duties of a justice of the peace on a regular basis.

38.Under the Prison (Amendment) Rules 1997, prison staff may not read letters that prisoners write to the Ombudsman.

39.A new section 67 B was also added at the same time. This provides that judges imposing discretionary sentences of life imprisonment must specify minimum terms for the persons concerned. It also provides direction for judges when imposing indeterminate sentences.

40.The principle of separation also applies between different categories of adult offenders. That is, in accordance with article 10.2 (a), male and female offenders are detained in separate institutions; persons detained pending trial are separated from convicted offenders.

41.As elsewhere, there are and always have been certain areas to which access is restricted. These include military facilities (barracks and firing ranges) and the border areas between Hong Kong and the Shenzhen Special Economic Zone. Access to the border areas is normally restricted to residents in those areas (otherwise special permits are necessary). The restrictions are necessary for the control of illegal immigration.

42.Paragraph 31 of the final report by the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under the International Covenant on Civil and Political Rights (CCPR/C/125).

43.According to the “Explanations of some questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the HKSAR”, “Chinese

citizens" means all Hong Kong residents who are of Chinese descent and born in Chinese territory (including Hong Kong).

44.Paragraph 7 of schedule 1 to the Immigration Ordinance (chap. 115) - amendment of 1 July 1997.

45.These are set out in paragraph 6 of Schedule 1 to the Immigration Ordinance and in articles 5 and 6 of "Explanations of some questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in HKSAR". These are reproduced in annex 11.

46.This introduced into Schedule 1 of the Immigration Ordinance (chap. 115) the provision that the relationship of parent and child is taken to exist as follows: (a) of a mother and child, between a woman and a child born to the mother in or out of wedlock; (b) of a father and child, between a man and a child born to him in wedlock or, if out of wedlock, between a father and a child subsequently legitimated by the marriage of his parents; (c) of a parent and adopted child, between a parent and a child adopted only in Hong Kong under an order made by a court in Hong Kong under the Adoption Ordinance (chap. 290).

47.The process for preparing authentic Chinese versions for all ordinances in Hong Kong was completed in May 1997.

48.Essentially, the special list system entails assigning particular legal specialisms to particular judicial officers. The officers so designated do not exclusively adjudicate in areas relating to those specialisms. But, when cases arise in those areas while they are dealing with cases in other areas, the cases in their designated areas automatically become their next items of business.

49.There is a small number of civil cases, specified in the Legal Aid Ordinance (chap. 91), for which legal aid is not available. These include proceedings in respect of defamation, relator actions, proceedings for the recovery of a penalty where proceedings may be taken by any person and the whole or part of the penalty is payable to the person taking proceedings, and election petitions.

50.In MP No. 2410 of 1992 (Mayo J.) and CA No. 72 of 1993 (CA).

51.HKSAR v. Ma Wai Kwan, David. Counsel argued that the Provisional Legislative Council was an illegal body and that the Reunification Ordinance passed by it, which established the High Court after 1 July 1997, was not lawfully enacted, such that the High Court (the then Supreme Court) ceased to operate after 1 July 1997 and the indictment was not valid and the pending criminal proceedings should not continue.

52.Cheung Lai Wah v. Director of Immigration.

53.Section 4 of the Legal Aid Services Council Ordinance (chap. 489).

54.Prosecution policy is further discussed in paragraphs 510 to 514 below, in relation to article 26.

55.“Stalking” may be defined as behaviour that subjects another to a course of persistent conduct that, taken together over a period of time, amounts to harassment.

56.Section 33 of the Telecommunication Ordinance provides that “Whenever he considers that the public interest so requires, the Chief Executive, or any public officer authorized in that behalf by the Chief Executive either generally or for any particular occasion, may order that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order.”

57.Section 13 of the Post Office Ordinance provides that “(1) It shall be lawful for the Chief Secretary to grant a warrant authorizing the Postmaster General, or authorizing any or all the officers of the Post Office, to open and delay any specified postal packet or all postal packets of any specified class or all postal packets whatsoever. (2) It shall be lawful for the Postmaster General to delay any postal packet for such time as may reasonably be necessary for the purpose of obtaining a warrant under this section.”

58.Section 1 (2) of the Interception of Communications Ordinance provides that it shall come into operation on a day to be appointed by the Chief Executive (the then Governor) by notice in the Gazette.

59.There are a few exceptions. For example, a prisoner is not permitted to send a letter to, or receive a letter from (a) another prisoner unless with prior approval of the Superintendent; (b) a person where the Superintendent reasonably believes that the letter will pose a threat to any individual’s personal safety or to the security, good order and discipline of the prison.

60.These include, for example, circumstances where the Superintendent reasonably considers that the reading will assist in preventing or detecting criminal activities or in countering a threat to or an interference with the security, good order and discipline of the prison.

61.The Television Ordinance (chap. 52), the Telecommunication Ordinance (chap. 106) and the Broadcasting Authority Ordinance (chap. 391).

62.Section 13 C (3) (a) empowered the Broadcasting Authority to impose a licence condition requiring radio licensees to refrain from broadcasting certain programmes.

63.Video-on-demand (VOD) programme services are interactive multimedia services which enable viewers to call up programmes of their own choice at any time.

64.These include “Announcements in the Public Interest” (APIs), which provide information about Government consultation exercises, voter registration, educational messages (on themes such as industrial safety, equal opportunities and environmental protection, and emergency warning systems for typhoons, rainstorms, landslips and charitable appeals).

65.The Information Technology and Broadcasting Bureau was established in April 1998 in recognition of the growing importance of information technology and the convergence of information technology, telecommunications and broadcasting. The Bureau is responsible for formulating policies on broadcasting and telecommunications. It oversees the development and promotion of information technology in the public and private sectors.

66.The refinement (in 1995) of the former Category II into sub-categories II_A and II_B was foreshadowed in paragraph 237 of the previous report. The object was to provide more information to cinema goers.

67.COIAO defines the term “publish” as including “distribute, circulate, sell, hire, give or lend the article to the public or a section of the public”.

68.When an article is submitted to the Obscene Articles Tribunal for classification, the Tribunal will consider it in private, identify the part of the article which causes obscenity or indecency and make an interim classification. Where no person requires a review of an interim classification at a full hearing, that interim classification shall be deemed to be the classification of the Tribunal which made it. A full hearing will be conducted in public upon receipt of a request to review the interim classification of an article.

69.The rule in question was Prison Rule 56. At the time, the rule provided that “Prisoners may receive books or periodicals from outside prison under such condition as the Commissioner may determine”.

70.Submitted in September 1977 and examined in February 1979.

71.The Chief Executive (Designate)'s Office issued a consultation document, “Civil liberties and social order”, in April 1997. The consultation attracted comments from a wide spectrum of the community.

72.Meetings of the Provisional Legislative Council were at that time held in the Shenzhen Special Economic Zone. The Council was an interim body established by the Preparatory Committee under the authority and powers of the National People's Congress of the People's Republic of China to establish the first Legislative Council.

73.The amendments to the Societies Ordinance concern the freedom of association and are therefore discussed in relation to article 22.

74.The Ordinance defines “national security” as the “safeguarding of the territorial integrity and the independence of the People's Republic of China”. This interpretation is taken from the United Nations publication Freedom of the Individual under Law: an Analysis of Article 29 of the Universal Declaration of Human Rights (Human Rights Study Series, No. 3). In July 1997, the Chief Executive in Council issued administrative guidelines to the Commissioner of Police to ensure that the application of this concept was consistent with the Covenant.

75.Employment (Amendment) (No. 3) Ordinance 1997.

76.Section 32 K of the Ordinance provides that it shall be a valid reason for the employer to show that the dismissal was by reason of (a) the conduct of the employee; (b) the capability or qualifications of the employee for performing his work; (c) the redundancy or other genuine operational requirements; (d) statutory requirements (that is, it would be contrary to the law for the employee to continue in that employment); or (e) other substantial reasons.

77.The Trade Unions Ordinance formerly conferred immunity from civil suits for acts done in contemplation and furtherance of trade disputes on registered trade unions only, which included employees' unions, employers' associations and mixed organizations of employees and employers. The 1997 amendment was aimed at extending the scope of protection to individuals concerned in acts done in contemplation or furtherance of a trade dispute, which therefore included employers and employees in the trade disputes as well as members and officers of registered trade unions.

78.Those on the elimination of racial discrimination, on torture, on the rights of the child and on the elimination of discrimination against women.

79.The number of divorce petitions rose from 5,747 in 1987 to 10,292 in 1995, 12,834 in 1996 and 14,482 in 1997.

80.Under the Guardianship of Minors Ordinance, the Separation and Maintenance Orders Ordinance and the Matrimonial Proceedings and Property Ordinance.

81.Article 24 (3) of the Basic Law is reflected in Schedule 1 of the Immigration Ordinance, which stipulates that a person is a permanent resident if he/she is of Chinese nationality and born outside Hong Kong to a parent who is a permanent resident and who had the right of abode in Hong Kong at the time of the birth of the person.

82.The Home Affairs Department conducts regular surveys to help the Coordinating Committee identify and examine the problems encountered by the new arrivals. The Department also obtains direct information from new arrivals themselves.

83.Occasional child care is short-term day care for children under the age of six whose carers are unable to take care of them for brief periods. This service is provided in child care centres.

84.Paragraph 34 of the concluding observations of the Committee on the Rights of the Child on the United Kingdom's initial report in respect of Hong Kong under the Convention on the Rights of the Child.

85.The “Industrial, commercial and financial sectors”, “the professions”, “labour, grass-roots, religious and other sectors” and “former political figures, Hong Kong deputies to the National Peoples Congress and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference”.

86.Previously, such a person could not be an elector for seven years.

87.The Provisional Urban Council, the Provisional Regional Council and Provisional District Boards.

88.Some of the bodies deal with issues, that, by their nature, preclude direct scrutiny. For example, some examine matters of commercial confidence; others take personal testimony that is given on the understanding that it will not be attributed.

89.See paragraphs 335 to 344 above in respect of article 19.

90.Such as requiring a transferee to transfer at a lower rank when a local officer is available to replace him; restricting a transferee from being considered for promotion during his first agreement after transfer; and restricting a transferee from applying for transfer to permanent and pensionable terms.

91.As of 30 June 1998, 1,382 disabled children were receiving education in ordinary schools. “Peripatetic” services entail the “server” going to the client. The advisers go from school to school visiting disabled children placed there, helping them to overcome any learning and/or communication difficulties, and advising teachers and social workers how best to help and teach them.

92.In this context, “older workers” are those aged 35 or above.

93.The Local Employment Service helps people seeking work to find it. It also helps employers to fill job vacancies. It is discussed in detail in the first report under the International Covenant on Economic, Social and Political Rights, in relation to article 6 of that Covenant.

94.NLPRC is applicable to Hong Kong by virtue of article 18 of the Basic Law.

95.To receive such assistance, schools must be non-profit making and fulfil certain conditions, such as the provision of services for children with special education needs.
