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on civil and
political rights**

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HUMAN RIGHTS COMMITTEE

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

Second periodic report

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

* The report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999. Due to technical reasons, this report has been re-issued.

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Introduction

1. In paragraph 21 of its concluding observations of 15 November 1999 on the Hong Kong Special Administrative Region's (HKSAR's) initial report in the light of the Covenant, the Human Rights Committee (the Committee) sets the date for the submission of the next (second) periodic report as 31 October 2003. This report is submitted accordingly.
2. The initial report contained detailed information on the laws, policies, and practices that ensure Hong Kong's compliance with the Covenant. Many of those are of long standing and, by nature, tend to remain unchanged - or to change very little - over time. We do not propose repeating descriptions/explanations of such matters in this report and we will frequently state that "there have been no significant developments in regard to [the topic in question] and the situation remains essentially as explained in paragraphs [x to y] of the initial report". We have taken this approach, the purpose of which is to avoid repetition and excessive length, on the basis of the guidance in the UN Manual on Human Rights Reporting (page 67, final paragraph).
3. For these reasons, the present report is shorter than the initial one. In it, we focus on:
 - (a) Informing the Committee of significant developments since the hearing of the initial report; and, most importantly;
 - (b) Responding to the concerns and recommendations in the Committee's concluding observations of 15 November 1999.

PART I. GENERAL PROFILE OF HKSAR

LAND AND PEOPLE

4. The following tables present statistics on the population and economy of the Hong Kong Special Administrative region.

(a) Population by sex

Sex	Mid 1987 (million)	Mid 1992 (million)	Mid 1999 (million)	Mid 2003* (million)
Male	2.9	2.9	3.3	3.3
Female	2.7	2.9	3.3	3.5
Total	5.6	5.8	6.6	6.8

* Provisional figures.

(b) Population by age group and sex¹

Age	Sex	Percentage of total population			
		Mid 1987	Mid 1992	Mid 1999	Mid 2003*
Under 15	Male	11.7	10.6	9.1	8.1
	Female	10.8	9.9	8.4	7.6
15-18	Male	3.3	2.9	2.9	2.6
	Female	3.0	2.7	2.7	2.5
<i>(0-18)</i>	<i>Male</i>	<i>15.0</i>	<i>13.5</i>	<i>11.9</i>	<i>10.7</i>
	<i>Female</i>	<i>13.8</i>	<i>12.6</i>	<i>11.1</i>	<i>10.1</i>
19-64	Male	33.1	33.3	32.5	32.3
	Female	30.2	31.6	33.6	35.2
65 and over	Male	3.4	4.0	4.9	5.4
	Female	4.5	5.0	5.8	6.3
All age groups	Male	51.4	50.8	49.4	48.4
	Female	48.6	49.2	50.6	51.6

* Provisional figures

¹ Since August 2000, population estimates have been compiled based on “resident population”. Formerly, they were based on the “extended de facto” approach, which counted all Hong Kong Permanent and Non-Permanent Residents and visitors at a reference time-point. We have revised the population and related statistics for 1996 onwards on this basis.

(c) Educational attainment (population aged 15 and above)²

Educational attainment	Percentage							
	1986		1991		1996		2003 Q1	
	Male	Female	Male	Female	Male	Female	Male	Female
No schooling/ kindergarten	7.0	21.6	7.1	18.5	5.1	13.8	3.2	10.3
Primary	30.8	27.7	26.1	24.3	22.7	22.6	20.3	21.1
Secondary and above	62.2	50.7	66.8	57.2	72.2	63.6	76.5	68.6
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

(d) Literacy rate³

1984: 85.7%; 1996: 90.4%; 2000: 92.4%; 2001: 92.7%; 2002: 93.0%;
2003 Q1: 93.1%

(e) Percentage of population (excluding mutes) aged five and over by usual language/dialect

Usual language/dialect	Percentage		
	1991	1996	2001 ⁴
Cantonese	88.7	88.7	89.2
Putonghua	1.1	1.1	0.9
Other Chinese dialects	7.1	5.8	5.5
English	2.2	3.1	3.2
Others	1.0	1.3	1.2
	100.0	100.0	100.0

(f) Crude birth and death rates

	1987	1992	1999	2002
Crude birth rate (per 1 000 population)	12.6	12.3	7.8	7.1
Crude death rate (per 1 000 population)	4.8	5.3	5.0	5.0

² The figures for 1991 are derived from the Population Census taken in those years; those for 1986 and 1996 are derived from the respective By-censuses. Those for 2003 Q1 are from the General Household Survey.

³ The literacy rate refers to the proportion of persons aged 15 and above with educational attainment at primary or above. The figures are derived from the General Household Survey.

⁴ The figures for 2002 are not available.

(g) Life expectancy at birth (number of years)

Sex	1987	1992	1999	2002
Male	74.2	74.8	77.7	78.6
Female	79.7	80.7	83.2	84.5

(h) Infant mortality ratio (per 1,000 live births)

1987	1992	1999	2002
7.4	4.8	3.1	2.3

(i) Maternal mortality ratio (number of deaths per 100,000 registered live births)

1987	1992	1999	2002
4.3	5.5	2.0	2.1

(j) Fertility rate

	1987	1992	1999	2002 ⁵
General fertility rate (per 1 000 women - excluding foreign domestic helpers - aged 15-49)	47.9	46.3	28.1	26.2

(k) Percentage of household heads by sex

Sex	1986	1991	1996	2001
Male	73.0	74.3	72.8	71.2
Female	27.0	25.7	27.2	28.8

(l) Unemployment rate (%)⁶

1987	1992	1999	2000	2001	2002	2003 Q1
1.7	2.0	6.2	4.9	5.1	7.3	7.4 (7.5)

⁵ The drop in general fertility rate over the period 1987 to 2002 was associated with a number of factors like marriage postponement, postponement of low-order live births, curtailment of high-order births and unfavourable economic climate.

⁶ Annual figures refer to averages of the estimates obtained from the quarterly General Household Surveys for the four quarters of the year. Figure in bracket refers to seasonally adjusted unemployment rate. Seasonal adjustment is not applicable to annual average unemployment rates.

(m) Rate of inflation

(i) Composite Consumer Price Index (CPI)⁷

Year	Annual rate of change in CPI (%)
1996	6.3
1997	5.8
1998	2.8
1999	-4.0
2000	-3.8
2001	-1.6
2002	-3.0
2003 (Jan. - June)	-2.2

(ii) Implicit price deflators of Gross Domestic Product (GDP)

Deflator year	(2000 = 100)	Annual rate of change (%)
1996	106.9	5.8
1997	113.0	5.7
1998	113.2	0.2
1999	106.6	-5.8
2000	100.0	-6.2
2001	98.1	-1.9
2002	95.2	-3.0
2003 Q1	91.9	-4.7

(n) Gross Domestic Product

Year	At current market prices (US\$ million) ⁸	At constant (2000) market prices (US\$ million) ⁹
1996	156 572	146 434
1997	173 669	153 703
1998	165 249	146 009
1999	160 626	150 744
2000	165 362	165 362
2001	162 838	165 968
2002	161 530	169 720
2003 Q1	38 105	41 485

⁷ The Composite CPI is compiled on the basis of the expenditure patterns of about 90% of Hong Kong households with an average monthly expenditure of HK\$4,500 to HK\$65,999 in the base period of October 1999 to September 2000. This approximately corresponds to a monthly expenditure range of HK\$4,300 to HK\$62,700 at 2002 prices.

⁸ As a result of the major revision to GDP in August 2002, figures presented in this table have been revised. The base year of the constant price GDP was also updated to year 2000 from 1990.

⁹ Using the exchange rate of the respective year to convert the GDP at constant (2000) market prices.

(o) Per capita income

Year	At current market prices (US\$ million)	At constant (2000) market prices (US\$ million)
1996	24 329	22 754
1997	26 762	23 686
1998	25 253	22 313
1999	24 313	22 818
2000	24 811	24 811
2001	24 214	24 680
2002	23 800	25 007

(p) External debt: the HKSAR Government does not incur external debts.

(q) Ethnic composition of the Hong Kong population**Population by ethnicity in 2001**

Ethnicity	Males (‘000)	Females (‘000)	Both sexes (‘000)	% share in total (%)
Chinese	3 202	3 163	6 364	94.9
Non-Chinese	83	261	344	5.1
<i>Of which:</i>				
Filipino	7	135	143	2.1
Indonesian	1	49	50	0.8
British	12	7	19	0.3
Indian	9	9	19	0.3
Thai	1	13	14	0.2
Japanese	8	7	14	0.2
Nepalese	7	5	13	0.2
Pakistani	7	4	11	0.2
Others	31	31	61	0.9
Total	3 285	3 423	6 708	100.0

GENERAL POLITICAL STRUCTURE**Constitutional document**

5. In accordance with the provisions of article 31 and sub-paragraph 13 of article 62 of the Constitution of the People’s Republic of China (PRC), and the relevant decisions of the National People’s Congress (NPC) adopted at the Third Session of the Seventh NPC on 4 April 1990, the Hong Kong Special Administrative Region of the People’s Republic of China (HKSAR) was established on 1 July 1997. The Basic Law of the HKSAR came into effect on 1 July 1997. Among other things, the Basic Law provides that, under the principle of “One Country, Two Systems”, the socialist system and policies are not practised in the HKSAR and Hong Kong’s previous capitalist system and way of life will remain unchanged for 50 years. A copy of the Basic Law is at Annex 1.

6. To fully realise the principle of “One Country, Two Systems”, the Basic Law sets out the broad framework of the relationship between the Central Authorities and the HKSAR (Chapter II); the fundamental rights and duties of Hong Kong residents (Chapter III); the political structure (Chapter IV); the economic, financial and social systems of the HKSAR (Chapters V and VI); the conduct of the HKSAR’s external affairs (Chapter VII); and the interpretation and amendment of the Basic Law (Chapter VIII).

7. Among other matters, the Basic Law provides that:

(a) The HKSAR shall exercise a high degree of autonomy except in matters such as defence and foreign affairs and enjoy executive, legislative and independent judicial power, including that of final adjudication. The power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal established in the Region;

(b) The executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong;

(c) The 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 contravenes the Basic Law, and subject to any amendment by the legislature of the HKSAR;

(d) National laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law and that the laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People’s Congress may add to or delete from the list of laws in Annex III after consulting the Committee for the Basic Law of the HKSAR and the HKSAR Government;

(e) The HKSAR is authorised to conduct relevant external affairs on its own. The HKSAR may on its own, using the name “Hong Kong, China”, maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields;

(f) The HKSAR remains a free port, a separate customs territory and an international financial centre. There shall be free flow of capital. The HKSAR issues and manages its own currency;

(g) The HKSAR formulates its own policies on the development of education, science, culture, sports, labour and social services, and Hong Kong residents have the freedom of religious belief;

(h) Hong Kong residents enjoy a wide range of freedoms and rights and this will be further dealt with under the section of “General Legal Framework Within Which Human Rights Are Protected”; and

(i) The provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

System of Government

Constitutional Development

8. The Basic Law prescribes a blueprint for the HKSAR's constitutional development. It provides that the ultimate aim is the election of the Chief Executive and Members of the Legislative Council by universal suffrage.

9. The Chief Executive of the HKSAR is the head of the Region. The Executive Council assists him in policy-making. The Legislative Council of the HKSAR is the legislature of the Region - it enacts, amends or repeals laws, approves taxation and public expenditure, and raises questions on the work of the government. District Councils - established in accordance with articles 97 and 98 of the Basic Law - are consulted on district administration and other affairs. There is an independent judiciary.

Chief Executive

10. The Basic Law provides that the Chief Executive of the HKSAR shall be selected by election or through consultations held locally and be appointed by the Central People's Government. The method for selecting the Chief Executive shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. 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.

11. Annex I to the Basic Law further provides that –

“If there is a need to amend the method for selecting the Chief Executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive. And they shall be reported to the Standing Committee of the National People's Congress for approval.”

Executive Council

12. The Executive Council assists the Chief Executive in policy-making. Under article 56 of the Basic Law, 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 to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council. The Chief Executive in Council also determines appeals, petitions and objections under those ordinances that confer a statutory right of appeal. If the Chief Executive does not accept a majority opinion of the Executive Council, he shall put the specific reasons on record.

13. The Council normally meets once a week, and its proceedings are confidential, although many of its decisions are made public. It is presided over by the Chief Executive. As provided for in article 55 of the Basic Law, Members of the Executive Council are appointed by the Chief Executive from among the principal officials of the executive authorities, Members of the Legislative Council and public figures. They are Chinese citizens who are permanent residents

of the HKSAR with no right of abode in any foreign country. Their appointment or removal is decided by the Chief Executive. Their term of office shall not extend beyond the expiry of the term of office of the Chief Executive who appoints them.

Legislative Council

14. Article 68 of the Basic Law provides that the Legislative Council of the HKSAR shall be constituted by election. The method for its formation shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. Annex II to the Basic Law prescribes the composition of the Legislative Council during its first three terms as follows:

Membership	First term 1998-2000 (two years)	Second term 2000-2004 (four years)	Third term 2004-2008 (four years)
(a) Elected by geographical constituencies through direct elections	20	24	30
(b) Elected by functional constituencies	30	30	30
(c) Elected by an election committee	10	6	-
Total	60	60	60

15. The second Legislative Council Election was held on 10 September 2000. The turnout rates for the geographical constituency, functional constituency and election committee elections were 43.6%, 56.5% and 95.5% respectively. The present (second term) Legislative Council assumed office on 1 October 2000.

16. Annex II of the Basic Law provides that, if there is a need to amend the method for forming the Legislative Council after 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive. And they shall be reported to the National People's Congress for the record.

17. The powers and functions of the Legislative Council are specified in article 73 of the Basic Law. These include enacting, amending or repealing laws in accordance with the provisions of the Basic Law and legal procedures; examining and approving budgets introduced by the government; approving taxation and public expenditure; receiving and debating the policy addresses of the Chief Executive; raising questions on the work of the government; debating any issue concerning public interests; endorsing the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court; and receiving and handling complaints from Hong Kong residents.

District Councils

18. The first District Council election was held on 28 November 1999. The total turnout rate for this election was 35.8%. The 18 District Councils came into being on 1 January 2000 by virtue of the District Councils Ordinance. The Councils advise the Government of the HKSAR on district affairs and promote recreational and cultural activities, and environmental improvements within their respective districts. District Councils comprise both elected members and appointed members. Additionally, in the case of District Councils in rural areas, the local Rural Committee Chairmen serve as ex-officio members. The HKSAR is divided into 390 constituencies, each returning one elected member. There are 102 appointed members and 27 ex-officio members.

19. Consequent to the District Councils Review conducted in 2001, the Administration has implemented recommendations to enhance both the role and functions of the District Councils as Government's key advisers on district affairs and their ability to influence the provision, delivery and management of district services and facilities. This helps to ensure that the Government remains responsive to the changing needs of the community.

20. In the light of increase in population in three districts, the number of elected seats in the District Councils will be increased from 390 to 400 for the second term District Council commencing on 1 January 2004.

Abolition of the Municipal Councils

21. The two Provisional Municipal Councils were dissolved after the terms of office of the members expired on 31 December 1999, pursuant to the Provision of Municipal Services (Reorganization) Ordinance, which was passed by the Legislative Council in December 1999. With a view to improving co-ordination and efficiency, the Government set up new dedicated agencies to be responsible for food safety, environmental hygiene and leisure and cultural services with effect from January 2000.

22. In a Judicial review of the Ordinance, the High Court ruled that the Provision of Municipal Services (Reorganization) Ordinance (Chapter 552) was consistent with the Basic Law and the ICCPR as applied to Hong Kong.

The structure of the Administration

23. The Chief Executive is the head of the Government of the HKSAR. If the Chief Executive is not able to discharge his duties for a short period, such duties shall temporarily be assumed by the three Secretaries of Departments, namely the Chief Secretary for Administration, the Financial Secretary, or the Secretary for Justice, in that order of precedence. The Government of the HKSAR comprises a Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions, and commissions.

24. There are currently 11 bureaux, each headed by a Director of Bureau, which collectively form the Government Secretariat. With certain exceptions, the heads of government departments are responsible to the Secretaries of Departments and Directors of Bureaux. The exceptions are the Commissioner of the Independent Commission Against Corruption and the Director of Audit, who function independently and are accountable to the Chief Executive.

25. Following the implementation of the accountability system for principal officials on 1 July 2002, the Chief Secretary for Administration, the Financial Secretary, the Secretary for Justice, and the 11 Directors of Bureaux are no longer civil servants. They are directly responsible to the Chief Executive and are accountable to him for the success or failure of matters falling within the portfolios as assigned to them. They are appointed to the Executive Council. Together with the non-official members of the Executive Council, they assist the Chief Executive in policy-making. Under the accountability system, the civil service continues to remain permanent, meritocratic, professional and politically neutral.

The judicial system of the HKSAR

26. The legal system is firmly based on the rule of law and a Judiciary, which is independent of the executive authorities and the legislature.

27. Article 19 of the Basic Law provides that the HKSAR shall be vested with independent judicial power, including that of final adjudication. The courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. The courts of the HKSAR shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

28. The courts of justice comprise the Court of Final Appeal, the High Court (which consists of the Court of Appeal and the Court of First Instance), the District Court, the Magistrates' Court, the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal, the Obscene Articles Tribunal and the Coroner's Court. The courts hear and determine all criminal trials and civil disputes, whether between individuals or between individuals and Government of the Region.

29. Article 82 of the Basic Law provides that the power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal. Article 83 further provides that the structure, powers and functions of the courts of the HKSAR at all levels shall be prescribed by law.

30. All judges and judicial officers must have qualified as legal practitioners in Hong Kong or in a common law jurisdiction and have substantial professional experience.

Article 88 of the Basic Law provides that “Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.”

31. Judges have security of tenure. Article 89 of the Basic Law provides that “A judge of a court of the HKSAR may only be removed for inability to discharge his or her 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. The Chief Justice of the Court of Final Appeal of the HKSAR may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.”

GENERAL LEGAL FRAMEWORK WITHIN WHICH HUMAN RIGHTS ARE PROTECTED

Rule of Law

32. The fundamental basis for the protection of human rights is the rule of law maintained by an independent judiciary (see paragraphs 26 to 31 above). The principles that inform the rule of law are:

(a) **The supremacy of the law:** no individual is punishable or can lawfully be made to suffer personally or financially except for a breach of law established before the independent courts. Where, under the law, an official or an authority has discretion to make a decision, that discretion must be exercised legally, fairly and reasonably. Where it does not do so, the decision must be capable of successful challenge before the courts. The Basic Law guarantees the right of Hong Kong residents to institute legal proceedings in the courts against the acts of the executive authorities and their personnel; and

(b) **Equality before the law:** Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 22 provides that all offices set up in the HKSAR by departments of the Central People’s Government, or by provinces, autonomous regions, or municipalities directly under the Central Government and personnel of these offices shall abide by the laws of the Region. Article 14 provides that members of the garrison shall, in addition to abiding by national laws of the PRC, abide by the laws of the HKSAR. Article 35 also provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. No government authority or official, and no individual, is above the law. All persons, regardless of race, rank, politics, religion or sex, are equal before the law and subject to the same law. Individuals and the HKSAR Government have the same access to the courts to enforce legal rights or defend an action.

Human rights guarantees in the Basic Law

33. Article 4 of the Basic Law provides that the HKSAR shall safeguard the rights and freedoms of residents of the HKSAR and of other persons in the Region in accordance with law. The Basic Law guarantees a wide range of freedoms and rights, including:

- (a) Equality before the law;
- (b) Freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike;
- (c) Freedom of the person; freedom from torture; freedom from arbitrary or unlawful arrest, detention or imprisonment; freedom from arbitrary or unlawful search of the body; and right against arbitrary or unlawful deprivation of life;
- (d) Freedom from arbitrary or unlawful search of, or intrusion into, one's home or other premises;
- (e) Freedom and privacy of communication;
- (f) Freedom of movement within the HKSAR and freedom of emigration to other countries and regions and freedom to travel and to enter or leave the Region;
- (g) Freedom of conscience; freedom of religious belief and freedom to preach and to conduct and participate in religious activities in public;
- (h) Freedom of choice of occupation;
- (i) Freedom to engage in academic research, literary and artistic creation, and other cultural activities;
- (j) Right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies; right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel;
- (k) Right to social welfare in accordance with law; and
- (l) Freedom of marriage and right to raise a family freely.

Persons in Hong Kong other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed by Chapter III of the Basic Law. In addition, permanent residents of the HKSAR enjoy the rights to vote and to stand for election in accordance with law.

Effect of other human rights instruments in HKSAR law

34. According to article 39 of the Basic Law:

“The provisions of the ICCPR, the ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR.

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

35. In general, and as is usual in common law systems, treaties that apply to Hong Kong (including human rights treaties) do not themselves have the force of law in the domestic legal system of Hong Kong. They cannot directly be invoked before the courts as the source of individual rights. However, the courts will, when possible, construe domestic legislation in such a way as to avoid incompatibility with international treaties that apply to Hong Kong. The usual method of giving effect in local law to treaty obligations (when these require some change in existing laws or practice) is to enact specific new legislation.¹⁰ Where this results in the creation or definition of specific legal rights and where these rights are denied or interfered with (or there is the threat of such action), a remedy will be available in the courts through the ordinary procedures of civil litigation; or the law may provide criminal sanctions.

Bill of Rights Ordinance

36. The Hong Kong Bill of Rights Ordinance (BORO) (Chapter 383 of the Laws of the HKSAR) was enacted in June 1991 specifically to give effect in local law to the provisions of the ICCPR as applied to Hong Kong. It achieves this by setting out a detailed Bill of Rights, the terms of which are almost identical to those of the ICCPR.

Adoption of laws: effect on the BORO

37. Article 160 of the Basic Law provides that the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the NPC declares to be in contravention of the Basic Law. In February 1997, the Standing

¹⁰ An example is the Crimes (Torture) Ordinance (Chapter 427 of the Laws of the HKSAR) which was enacted to give effect in Hong Kong to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Committee considered that three sections of the BORO (relating to the interpretation and application of the Ordinance¹¹) had an overriding effect over other laws, including the Basic Law. As such, they contravened the Basic Law and could not be adopted.

38. The non-adoption of these sections has no effect on the protection of human rights in the HKSAR in view of the constitutional guarantee in article 39 of the Basic Law. The substantive protections in Part II of the Ordinance (which are almost identical to the provisions of the ICCPR) are unchanged. So too are the remedies provided under section 6 for contravention of the Ordinance and the binding effect on the Government and all public authorities under section 7. The full text of the BORO as it now stands is at Annex 2.

Legal aid

39. Eligible applicants receive legal aid through the provision of the services of a solicitor and a barrister in court proceedings, as necessary, to ensure that any person who has reasonable grounds for pursuing or defending a legal action is not prevented from doing so by lack of means. Publicly funded legal aid services are provided through the Legal Aid Department and the Duty Lawyer Service.

Legal Aid Department

40. The Legal Aid Department provides legal representation to eligible persons in both civil and criminal cases heard in the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court and the Magistrates' Court (for committal proceedings). Civil legal aid is available to proceedings covering major areas of livelihood of the community ranging from family disputes to immigration matters and coroner's inquests. Applicants must satisfy the

¹¹ The three sections were -

- (a) Section 2(3): "In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters."
- (b) Section 3: "Effect on pre-existing legislation -
 - (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
 - (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed."
- (c) Section 4: "Interpretation of subsequent legislation - All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong."

Director of Legal Aid of their financial eligibility (the means test) and of the justification for legal action (the merits test). The grant of legal aid is not subject to a residence requirement. In criminal cases, the Director has discretion to waive the upper limits of the means test if he considers it in the interest of justice to do so. He also has the same discretion in meritorious applications where a breach of the BORO or the ICCPR as applied to Hong Kong is an issue. Subject to the means test (unless waived by a judge), it is mandatory to grant legal aid to an applicant charged with murder, treason or piracy with violence. For other offences, provided the applicant passes the means test, a judge may grant legal aid notwithstanding that legal aid has been refused on merits by the Director.

The Duty Lawyer Service

41. This Service complements the legal aid services provided by the Legal Aid Department. It operates three schemes that respectively provide legal representation (the Duty Lawyer Scheme), legal advice (the Legal Advice Scheme) and legal information (the Tel Law Scheme). The Duty Lawyer Scheme offers legal representation to virtually all defendants (juvenile and adult) charged in the Magistracies who cannot afford private representation. It also provides legal representation to persons who are at risk of criminal prosecution as a result of giving incriminating evidence in Coroner's inquests. Applicants are subject to a means test and merits test, based on the "interest of justice" principle in accordance with article 14 of the ICCPR and article 11 of the Hong Kong Bill of Rights. The Legal Advice Scheme and the Tel Law Scheme respectively provide members of the public with free legal advice through individual appointments and taped information on the legal aspects of everyday problems.

Legal Aid Services Council

42. The Legal Aid Services Council, an independent statutory body, was established in 1996. Its role is to oversee the provision of legal aid services by the Legal Aid Department and advise the Chief Executive on legal aid policy.

Office of the Ombudsman

43. The Ombudsman - formerly known as the Commissioner for Administrative Complaints (COMAC) - is an independent authority, established under The Ombudsman Ordinance (Chapter 397).¹² The Ombudsman investigates and reports on grievances arising from maladministration. "Maladministration" includes such things as inefficient, bad or improper administrative decisions, acts, recommendations or omissions. Members of the public can complain directly to The Ombudsman, who can also initiate investigations on her own volition and may publish investigation reports of public interest. Additionally, The Ombudsman is empowered to investigate complaints of non-compliance with the Code on Access to Information.

¹² Formerly known as the COMAC Ordinance.

44. The enactment of The Ombudsman (Amendment) Ordinance 2001 enables the independent status of The Ombudsman and enables her to carry out her functions more effectively. The Ombudsman is entrusted with full autonomy and statutory powers to conduct its own administrative and financial business. The Ordinance also makes it clear that The Ombudsman is not a servant or agent of the Government.

45. Subject to The Ombudsman Ordinance, The Ombudsman may obtain any information and documents from such persons as she thinks fit. She may summon any person to provide information relating to her investigations and may enter any premises of the organisations under her jurisdiction to conduct investigations. She also has sufficient means with which to ensure that her recommendations are heard and acted upon.

46. After investigating a complaint, The Ombudsman is empowered to report her opinion and reasons, together with a statement of any remedy and recommendation that is considered necessary, to the head of the organisation affected. If the recommendation is not acted upon within a reasonable timeframe, The Ombudsman may report the matter to the Chief Executive. She may also do so if she believes that there has been a serious irregularity or injustice done. Such reports are bound by law to be laid before the Legislative Council.

47. With the exceptions of the Police and the Independent Commission Against Corruption (ICAC), The Ombudsman has jurisdiction over all Government departments of the HKSAR and major statutory bodies. Complaints against these two departments are handled by discrete, dedicated bodies (see paragraphs 50 and 51 below). However, complaints of non-compliance with the Code on Access to Information by the Police and the ICAC are still subject to The Ombudsman's jurisdiction.

Equal Opportunities Commission

48. The Equal Opportunities Commission (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 the 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 the SDO and the DDO in December 1996. It issued a similar code in relation to the FSDO in March 1998. The Code of Practice on Education under the DDO was issued in July 2001 to assist educational establishments in fulfilling the requirements of the DDO.

Privacy Commissioner for Personal Data

49. The Personal Data (Privacy) Ordinance (PDPO) provides for statutory control of the collection, holding and use of personal data in both the public and private sectors. Its provisions are based on internationally accepted data protection principles. It applies to personal data to

which access is reasonably practicable whether they are in computerised, manual (for example, paper file), or audio-visual form. To promote and enforce compliance with its provisions, the Ordinance provides for an independent statutory authority - the Privacy Commissioner for Personal Data - with appropriate powers of investigation and enforcement. His responsibilities also include promoting awareness and understanding of the Ordinance, publishing codes of practice on how to comply with the Ordinance, and examining proposed legislation that may affect the privacy of individuals in relation to personal data.

Complaints and investigations

The Police

50. The Complaints Against Police Office (CAPO) investigates complaints about the conduct and behaviour of members of the police force. The CAPO's investigations are monitored and reviewed by the Independent Police Complaints Council (IPCC). The IPCC is an independent civilian body comprising non-official members appointed by the Chief Executive from a wide spectrum of the community and include Members of the Legislative Council and the Ombudsman or her representative.

The ICAC

51. The Independent Commission Against Corruption Complaints Committee - established in 1977 - monitors and reviews the handling by the ICAC of non-criminal complaints against the ICAC and officers of the ICAC. Again, this is an independent committee appointed by the Chief Executive. The Committee comprises mainly of members of the Executive and Legislative Councils and a representative of the Ombudsman. Complaints against the ICAC or its officers can be made direct to the Committee as well as the ICAC at any of its offices. The investigation of such complaints is handled by a special unit of the Operations Department of the ICAC. When the unit has completed its investigation of a complaint, its conclusions and recommendations are submitted to the Committee for consideration.

Other disciplined services

52. Other disciplined services departments maintain clear guidelines and procedures for handling complaints. For example, the Correctional Services Department (CSD), which runs HKSAR's prisons, has a Complaints Investigation Unit to manage its internal grievance redress system for staff, prisoners, and members of the public. These persons may also direct their complaints to the Ombudsman. The existing complaint channels are considered effective in view of the number and the nature of complaints handled.

53. The Immigration Department applies complaints procedures set out in the Immigration Service Standing Orders made by the Director of Immigration under the authority of the Immigration Service Ordinance. Complaints about abuse of authority or maltreatment by service members can be made to the Director of Immigration and are investigated promptly in accordance with the procedures in the Standing Orders. To ensure that all complaints are properly handled, a Complaints Review Working Party examines the results of investigations,

conduct reviews and recommends follow-up action whenever necessary. Persons who consider that they have been improperly treated or that their cases have been mismanaged also have access to the Ombudsman. If there is prima facie evidence that a member of the Immigration Service has committed a criminal offence, the Immigration Service will immediately report the matter to the police for further investigation. Disciplinary procedures against Immigration Service staff are also governed by the Immigration Service Ordinance and the Immigration Service Standing Orders. Under section 8 of the Immigration Service Ordinance (Chapter 115), unlawful or unnecessary exercise of authority resulting in loss or injury to any person is a disciplinary offence.

INFORMATION AND PUBLICITY

Promotion of public awareness of the human rights treaties

54. The Home Affairs Bureau of the HKSAR Government is responsible for promoting public awareness of the rights and obligations stipulated in the human rights treaties applicable to Hong Kong. Following the enactment of the BORO in 1991, the Committee on the Promotion of Civic Education (CPCE) under the Home Affairs Bureau established a Human Rights Education Sub-Committee to promote public understanding of the BORO and respect for human rights as set out in the various treaties. Human rights have been one of the major emphases of the CPCE's work. Recently, the CPCE has increased its efforts to promote a public understanding of the Basic Law, which provides the constitutional guarantees for human rights protection in the Region. A Basic Law Promotion Steering Committee - chaired by the Chief Secretary for Administration - was established in January 1998 to guide promotional strategy.

55. In 2002, the Bureau established a joint NGO/Government forum, the Committee on the Promotion of Racial Harmony, to advise Government on the promotion of inter-racial respect and tolerance and matters relating to the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee is serviced by the Race Relations Unit, also established in 2002 under the auspices of the Home Affairs Bureau.

Government publications

56. The Central People's Government of the People's Republic of China is obliged to submit reports in respect of the HKSAR under various human rights treaties (but see paragraph 54 below in relation to the ICCPR). Draft reports are prepared by the Home Affairs Bureau and the Health, Welfare and Food Bureau of the HKSAR Government. The Bureaux consult the Legislative Council and non-governmental organisations on the state of the implementation of these treaties in Hong Kong. They address their views in the reports, which they table before the Legislative Council - and publish in bound, bilingual format - after the Central People's Government has submitted them to the United Nations. Copies are deposited in public libraries and posted on the Internet for public inspection.

Reports of the HKSAR in the light of the ICCPR

57. In November 1997, the Central People's Government of the People's Republic of China announced that, in line with the Joint Declaration and the Basic Law, and considering that China was not yet a signatory to the two Covenants, it would make reference to the provisions of the two Covenants as applied to Hong Kong and transmit reports on the HKSAR to the United Nations. China subsequently ratified the ICESCR in 2001 and the HKSAR's reports form part of China's reports under that Covenant.¹³ The Government of the HKSAR is responsible for preparing the reports on the Region in relation to the ICCPR for transmission to the United Nations.

¹³ The HKSAR's second report under the ICESCR was submitted to the United Nations in June 2003 as part of China's initial report under that Covenant.

**PART II. REPORT ON THE IMPLEMENTATION OF PARTS I, II
AND III AND ARTICLE 40 OF THE COVENANT**

Article 1: Progress and development of democracy

58. Articles 45 and 68 of the Basic Law provide that the methods for selecting the Chief Executive and for forming the Legislative Council shall be specified in the light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress. The ultimate aims are the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, and the election of all members of the Legislative Council by universal suffrage.

59. Article 45 of the Basic Law also states that the specific method for selecting the Chief Executive shall be as prescribed in Annex I to the Basic Law:

- The Chief Executive shall be elected by a broadly representative Election Committee; and
- The Committee shall be composed of 800 members who shall be drawn from the four sectors prescribed in article 2 of the Annex. The majority of the members on this Committee are elected by various community and functional groups representing, inter alia, labour, social services, religious, professional, industrial, commercial, financial and political sectors.

60. The second term Chief Executive was elected in February 2002 by the 800-member Election Committee, in accordance with the Basic Law and the Chief Executive Election Ordinance (Chapter 569). Further details are provided in paragraphs 325 to 327 below in relation to article 25.

61. Article 68 of the Basic Law states that the specific method for forming the Legislative Council shall be prescribed in Annex II to the Basic Law. Annex II to the Basic Law provides that the number of directly elected seats in the Legislative Council will increase from one-third (20 seats) in the first term (1998-2000), to 40 per cent (24 seats) in the second term (2000-2004), and to 50 per cent (30 seats) in the third term (2004-2008).

62. The second Legislative Council Elections were held in September 2000. Twenty-four of its members were elected by universal suffrage in accordance with the provisions of the Basic Law. Further details are provided in paragraphs 272 and 273 below, in relation to article 25. In July 2003, the Legislative Council enacted the Legislative Council (Amendment) Ordinance 2003. The amendments provide the legal basis for the election (in 2004) of the third term Legislative Council. Specifically, it provides that the number of directly elected seats in the third term Legislative Council will be increased to 30 (50 per cent of all Legislative Council seats), as prescribed in the Basic Law.

63. Annex I to the Basic Law further provides that if there is a need to amend the method for selecting the Chief Executive for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all Legislative Council members and the consent of the Chief Executive. They shall be reported to the Standing Committee of the National People's Congress (NPCSC) for approval.

64. Similarly, Annex II of the Basic Law permits amendments to the method for forming the Legislative Council after 2007, if there is a need to do so. Such amendments shall require the endorsement of a two-thirds majority of all Legislative Council members and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the NPCSC for the record.

Review of Constitutional Development in Hong Kong

65. In his Policy Address of 7 January 2004, the Chief Executive said that the HKSAR Government understood the community's concerns about Hong Kong's future constitutional development. He undertook that, on the basis of maintaining the "One Country, Two Systems" principle and adhering to the Basic Law, the Government would actively promote constitutional development in Hong Kong. He also announced the establishment of the Constitutional Development Task Force, which was to be led by the Chief Secretary for Administration. The Task Force's members include the Secretary for Justice and the Secretary for Constitutional Affairs. Its tasks are to examine in depth the issues of principle and legislative process in the Basic Law relating to constitutional development, to consult the relevant departments of the Central Authorities, and to gather the views of the public on the relevant issues. On 30 March, the Task Force published its First Report on the issues of legislative process. This was followed, on 15 April, by its Second Report on the issues of principle.

66. On 15 April 2004, having consulted the Executive Council, the Chief Executive endorsed the two Reports, agreeing that the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 should be amended, so as to enable Hong Kong's constitutional development to move forward. He then submitted a report to the NPCSC, in accordance with the Interpretation of the relevant provisions of the Annexes to the Basic Law adopted by the NPCSC on 6 April 2004.¹ The report requested the NPCSC to determine, in

¹ In accordance with the "Interpretation by the Standing Committee of the National People's Congress of article 7 of Annex I and article III of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" adopted by the Standing Committee of the Tenth NPC at its Eighth Session on 6 April 2004, "[t]he Chief Executive of the Hong Kong Special Administrative Region shall make a report to the Standing Committee of the National People's Congress as regards whether there is a need to make an amendment; and the Standing Committee of the National People's Congress shall, in accordance with the provisions of articles 45 and 68 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, make a determination in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress ...".

accordance with the provisions of articles 45 and 68 of the Basic Law, and in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress, whether the methods for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008 may be amended.

67. On 26 April 2004, the NPCSC decided that:

(a) The election of the third Chief Executive of the HKSAR to be held in the year 2007 shall not be by means of universal suffrage. The election of the Legislative Council of the HKSAR in the fourth term in the year 2008 shall not be by means of an election of all the members by universal suffrage. The ratio between members returned by functional constituencies and members returned by geographical constituencies through direct elections, who shall respectively occupy half of the seats, is to remain unchanged. The procedures for voting on bills and motions in the Legislative Council are to remain unchanged;

(b) Subject to the above article of the Decision not being contravened, appropriate amendments that conform to the principle of gradual and orderly progress may be made to the specific method for selecting the third Chief Executive of the HKSAR in the year 2007 and the specific method for forming the Legislative Council of the HKSAR in the fourth term in the year 2008 according to the provisions of articles 45 and 68 of the Hong Kong Basic Law and the provisions of article 7 of Annex I and article III of Annex II to the Hong Kong Basic Law.

68. Before making its decision, the NPCSC had fully considered the views of the public gathered by the Constitutional Development Task Force. It had also taken the initiative to meet with various sectors in Hong Kong to listen to their views. The decision was made having considered the full range of views expressed by the community on the pace of democratisation, Hong Kong's actual situation and the need to balance the interests of different sectors. The decision also specified the scope for amendments. Accordingly, there is still room for us to adopt appropriate amendments for the two election methods for the gradual and orderly progress of democratisation.

69. On 11 May 2004, in the light of the relevant provisions of the Basic Law and the NPCSC's decision, the Task Force published its Third Report, setting out the areas that may be considered for amendment in respect of the methods for the selection of the Chief Executive in 2007 and for forming the Legislative Council in 2008. As we were finalising this report, the Task Force was gathering views and specific proposals from individuals and organisations in the community. This process will continue until 31 August 2004. The Task Force will then consolidate the views received for further public consultation.

Article 2: Ensuring to all individuals the rights recognised in the Covenant**General**

70. In paragraph 8 of its concluding observations on the initial report, the Committee expressed the concern “that most of the recommendations formulated in the Committee’s concluding observations¹ have not yet been implemented”. The position is that, after we received the 1995 concluding observations, we gave each recommendation the most careful consideration, both in the light of the Committee’s concerns and having regard to Hong Kong’s prevailing situation and to the circumstances that the policies were designed to address. In several instances, the Committee’s concerns have been met. Taking those concerns seriatim with their appearance in the 1995 concluding observations:

(a) **Discrimination against women (paragraph 13 of the 1995 concluding observations):** in paragraph 67 of the initial report - in response to the regrets the Committee had expressed in this regard - we explained that the Sex Discrimination Ordinance (Chapter 480) had come into force; that the limit on damage awards had been removed; and that the District Courts had been empowered to order the reinstatement of claimants;

(b) **Vietnamese asylum seekers (paragraph 17 of the 1995 concluding observations):** in early 2000, the decision was taken to close the single remaining refugee centre and to permit the integration into Hong Kong society of those remaining. The closure of the Pillar Point open centre, which took place in June of that year, went ahead peacefully and without incident. There is further discussion of this issue in paragraphs 96 and 97 below in relation to article 9; and

(c) **Official charge forms, charge sheets and court documents (paragraph 20 of the 1995 concluding observations):** in paragraph 276 of the initial report, we indicated that we expected to complete the production of authenticated bilingual charge sheets by June 1999. The exercise is complete and all charge sheets are now bilingual. So, too, are all police forms relating to offenders and the charges that they may face.

71. It was with regret that - in some instances - we felt it necessary to respectfully differ with the Committee as to what could or should be done. But, in all sincerity, we were obliged to conclude that the positions we had formulated in relation to the issues in question were the appropriate ones in the circumstances and having regard to the local conditions. In each instance, we explained our position - and the reasoning behind it - in the body of our initial report. We shall give further explanation in the following paragraphs. Those positions were not

¹ The reference was to the Committee’s concluding observations of November 1995 on the Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong. The report was to the Committee submitted in July 1995 and was heard in October 1995. Here and throughout this report, we refer to this report as “the 1995 report” and to the Committee’s concluding observations thereon as “the 1995 concluding observations”.

lightly reached and we have not, and will not, lose sight of the Committee's concerns and recommendations as we continue to monitor our policies in the coming years. Where it is practicable to do so, we will implement them either fully or in part.

72. Against this background, commentators have asked us to explain our view that, while we hold Treaty Bodies in the highest esteem and accord their concluding observations the utmost respect and closest attention, we do not consider them to be binding international law. Our position derives - inter alia but primarily - from the United Nations Manual on Human Rights Reporting,² at page 40 under heading (c): "The essence of dialogue":

"At this point, one must stress that the Committees are neither courts nor quasi-judicial bodies. The nature of their activity may be of a different quality with regard to the competence of some treaty bodies to receive and to examine individual complaints or communications. However, it has never been claimed that the treaty bodies may perform judicial or quasi-judicial functions in the consideration of States Parties' reports. The Committees, as a result of the dialogue, do not issue a judgement regarding the degree of implementation of the provisions contained in the relevant instrument in the reporting State.

The purpose of the dialogue is rather to assist the reporting State in the implementation of its treaty obligations. The dialogue should clarify the scope and the meaning of the treaty obligations and should highlight those aspects that may have been neglected by the authorities of the reporting State. It is in this spirit that the members of the Committees raise issues of concern to them, ask their questions, and formulate their comments accordingly at the end of the consideration of a report. And it is in the same spirit that the written comments of the Committee as a whole are formulated at the conclusion of the consideration of a report."

73. In implementing our obligations under the treaties, we act in good faith in deciding how and when to act on the Treaty Bodies' concluding observations. We regard this as the prerogative of governments that have the ultimate responsibility for the governance and well being of their people. In so doing, they must exercise their best judgement as to what is or is not conducive to the common weal and act upon that judgement even when that may entail deferring action in accordance with a particular Treaty Body recommendation. In this regard, we consider our position to be consistent with the view that the Committee expressed in its general comment 3 of 1981,³ where the Committee noted that:

"... article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article."

² Soft cover edition, 1997.

³ Thirteenth session.

74. That said, we must point out that, while the recommendations in the concluding observations and the decisions of the treaty bodies are not directly binding on the courts in Hong Kong, the courts have often used them in the construction of statutes and cases. For example, in the case of *Shum Kwok Sher v HKSAR*,⁴ the Court of Final Appeal held that:

“In interpreting the provisions of Chapter III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions.”

75. Action on concluding observations is not of course, the only way in which governments give effect to their treaty obligations. It is also important that they ensure that their laws, policies, and administrative measures are consistent with those obligations. Thus, in Hong Kong, when legislation is being prepared, or when Government policies are formulated, the Department of Justice advises the responsible bureau or department on the compatibility of those proposals with the treaties as applied to Hong Kong. When providing such advice, the Department draws substantially on the relevant concluding observations and General Comments of the treaty bodies.

Human Rights Commission

76. In paragraph 9 of its concluding observations, the Committee stated that it remained “concerned that there is no independent body established by law to investigate and monitor human rights violations in HKSAR and the implementation of Covenant rights”. Local commentators have continued to echo this concern.

77. We are aware that the Committee has in mind the establishment of a dedicated human rights commission. We have long appreciated the need for a framework to monitor and implement the rights guaranteed in the Covenant and the other human rights treaties that apply to Hong Kong. But, having carefully examined our existing framework, we reached the position explained in paragraphs 21 and 22 of our initial report (in relation to article 2), where we observed that a Bill of Rights enabled the courts to provide effective remedies against violations of human rights. This was, as we said there, complemented by a truly independent judiciary, a sound and comprehensive legal aid system, an effective Ombudsman, and an active advisory committee on civic education. We pointed out, too, that the Government also operated in the full view of a free and active press and was monitored by local and international NGOs.

78. We took the view that those safeguards provided a sound framework for the protection and enhancement of human rights. Indeed, they had served Hong Kong well and we concluded by reaffirming our belief that it was sensible to continue with this framework rather than to

⁴ [2002] 2 HKLRD 792, at paragraph 59.

devise an entirely new institution with a wide-ranging but imprecise remit in the field of human rights. However, in the light of the Committee's continued concern, we shall keep in view any future changes of circumstance that may require us to reconsider our position.

Review of the Equal Opportunities Commission (EOC)

79. The EOC's functions are as explained in paragraph 23 of the initial report, in relation to article 2 of the Covenant. In order to perform its functions more efficiently and effectively, the EOC commissioned consultants to review its complaint handling procedures, organisational structure and other related matters. The review was completed in 2002 and the EOC has taken its recommendations forward.⁵ In so doing, it has tightened its investigation and conciliation procedures with a view to greater efficiency.

Human rights education

80. The position is essentially as explained in paragraphs 27 to 34 of the initial report, in relation to article 2 and as updated in paragraphs 13.61 to 13.69 of our second report under the ICESCR, in relation to article 13 of that Covenant. Annex 3 explains the position in relation to civil servants. The position in regard to judges is essentially as explained in paragraphs 30 to 32 of the initial report: Hong Kong's Judiciary continues to operate 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. To ensure that judges' knowledge of these matters remains current, the Judicial Studies Board provides them with continuing education and training. Human rights law is one of many new areas that are emphasised.

The Ombudsman

81. The role of The Ombudsman is essentially as explained in paragraph 35 to 39 of the initial report in relation to article 2. However, The Ombudsman's jurisdiction now covers 17 statutory bodies, rather than the 14 previously reported. The Ombudsman (Amendment) Ordinance of December 2001 added the Equal Opportunities Commission and the Office of the Privacy Commissioner for Personal Data under the jurisdiction of The Ombudsman.

82. Under section 3 of The Ombudsman Ordinance (Chapter 397), The Ombudsman is now a corporation sole, with full statutory power to conduct the administrative and financial business of the Office. The Ordinance empowers her to sue and to be sued; to appoint staff and technical or professional advisers; to acquire and hold property; to enter into contracts; and to charge fees for services provided. Section 6B of the Ordinance specifically provides that The Ombudsman is not a servant or agent of the Government. She is subject to the scrutiny of the Director of Audit

⁵ This review is not to be confused with the 2002 Government review of the remuneration packages of the senior executives of Government-funded bodies, including the Commission. That was a discrete exercise, the purpose and outcome of which are explained in paragraph 2.19 of our second report under the ICESCR, in relation to Article 2 of that Covenant.

in regard to the economy, efficiency and effectiveness with which she expends resources. She is also subject to the control of the Prevention of Bribery Ordinance (Chapter 201). Together, these measures ensure the independence of The Ombudsman and the effective public monitoring of her Office.

83. In the year 2002-03, The Ombudsman received 14,298 enquiries and 4,382 complaints. A total of 124 complaints were investigated, of which The Ombudsman found 54 substantiated or partially substantiated, and made 173 recommendations to redress grievances and improve public administration. She also completed six direct investigations, making 72 recommendations in relation to them. As previously reported (in paragraph 39 of the initial report), the Government accepts and acts on almost all The Ombudsman's recommendations. The practices to ensure transparency remain as explained in paragraph 39 of the initial report.

The Administrative Appeals Board

84. The position is as explained in paragraphs 40 to 42 of the initial report.

Complaints against the Police

85. In paragraph 50 of the initial report, we explained the role of the Complaints Against Police Office (CAPO) and its civilian overseer, the Independent Police Complaints Council (IPCC). Since then, we have taken steps to increase transparency:

(a) **The IPCC Observers Scheme (initial report, paragraph 51 (a)):** in September 1999, we expanded the Scheme by appointing retired IPCC members and other community leaders as Lay Observers. The Lay Observers can observe CAPO investigations on both a scheduled and surprise basis. Initially, there were 29 Observers in the new class. Now, there are 68 (30 June 2003). And the number of observation exercises has also increased significantly: from five in 1997 to 260 in 2002;

(b) **The Serious Complaints Committee:** this is a special panel within the IPCC, which the Committee established in 1997 in order to monitor selected serious complaints, such as allegations of assaults resulting in serious injuries and cases of wide public interest. The Committee requires CAPO to provide monthly progress reports on the cases so selected. The Committee may seek clarification of matters contained in those reports before CAPO concludes its investigations into the cases in question. In 2002, some 19 cases were selected for special monitoring;

(c) **Meetings:** the bi-monthly joint meetings between the IPCC and the CAPO have been partially open to the public since March 1998. The minutes of the open part of those meetings are publicly available on the IPCC's web site; and

(d) **Performance pledges (initial report, paragraph 51(b) (i)):** the CAPO has consistently maintained an achievement rate of over 90% in the fulfilment of the performance pledges previously reported.

Statistics

86. The table below provides an analysis of the results of investigation endorsed⁶ by the IPCC between 1 January 1998 and 30 June 2003.

Result of investigation	1998	1999	2000	2001	2002	2003 (to 30 June)
(1) Allegations fully investigated						
Substantiated/substantiated other than reported	149	223	221	241	246	114
Not fully substantiated	63	109	54	30	19	7
Unsubstantiated	666	1 011	1 087	1 123	986	456
False	301	410	470	383	354	114
No fault	149	233	374	478	397	180
Sub-total:	1 328 (31.6%)	1 986 (36.9%)	2 206 (37.2%)	2 255 (36.9%)	2 002 (32.2%)	871 (29.9%)
(2) Cases not fully investigated						
Withdrawn/not pursuable/ curtailed	1 782 (42.4%)	2 127 (39.5%)	2 303 (38.8%)	2 357 (38.6%)	2 542 (40.9%)	1 277 (43.8%)
(3) Informal resolution	1 090 (26.0%)	1 272 (23.6%)	1 425 (24.0%)	1 491 (24.4%)	1 669 (26.9%)	769 (26.4%)
Total	4 200	5 385	5 934	6 103	6 213	2 917

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

Response to the 1999 concluding observations

87. In paragraph 11 of its concluding observations on the initial report, the Committee took “the view that the Independent Police Complaints Council has not the power to ensure proper and effective investigation of complaints against the police”. The Committee remained concerned “that investigations of police misconduct are still in the hands of the police themselves, which undermines the credibility of these investigations”. It recommended that “the HKSAR should reconsider its approach on this issue and should provide for independent investigation of complaints against the police”.

88. We must stress that our system does not rely exclusively on the good faith of serving members of the Police Force. The CAPO operates independently of all operational and support formations of the Police. And the IPCC closely monitors and reviews CAPO’s investigations of complaints against the police. The IPCC is an independent civilian body comprising non-official members from a wide spectrum of the community, including members of the Legislative Council and the Ombudsman or her representative. It is serviced by its own full-time secretariat.

⁶ In this context, ‘endorsed’ means that, having examined the findings of CAPO investigations, the IPCC agrees with them. If it does not, the IPCC can ask CAPO to clarify areas of doubt or to re-investigate the complaint.

89. There are effective checks and balances to ensure that complaints are handled thoroughly, fairly and impartially. The CAPO prepares detailed investigation reports on all complaints. These are submitted to the IPCC, which then rigorously examines them. Where IPCC members have doubts about a particular investigation, they may invite the complainants, complainees and witnesses to interviews. The Council can also ask CAPO to submit for its reference any document or information relevant to a complaint. In discharging their duties, members of the IPCC may observe the CAPO's investigations in person, on either a surprise or a scheduled basis. If the IPCC is not satisfied with the results of an investigation, it can ask CAPO to clarify any doubts or to reinvestigate the complaint. It may also bring the case to the personal attention of the Chief Executive, together with recommendations as to its disposition. Clearly, therefore, the IPCC has adequate means to ensure that investigations are conducted properly and effectively.

90. Over the years, we have introduced numerous measures to improve the credibility and transparency of the system. In particular, the Observers Scheme and the IPCC Interviewing Witness Scheme have improved the Council's ability to monitor the CAPO investigations. Other measures have included the establishment of a special IPCC panel to monitor serious complaints and appointing retired members of the IPCC and other community leaders as Lay Observers of the CAPO investigations. We believe that this progressive, incremental approach is prudent and appropriate for Hong Kong.

91. To further improve the existing system, we are taking steps to convert the IPCC into a statutory body and we are preparing draft legislation to put this proposal into effect. Inter alia, this will empower the IPCC to legally oblige the CAPO to submit for the IPCC's examination statements and videotapes taken during investigations of complaints. Consultations conducted in March 2002 indicated that this proposal enjoyed public support.

92. A comparative study that we conducted in 1996 indicated that our system was on par with corresponding systems in other parts of the developed world. The study indicated that ours was one of the most sophisticated systems in Asia: indeed, Hong Kong was one of the few Asian territories where complaints against the police were subject to the oversight of a civilian body. But the study was not confined to Asia. It also covered jurisdictions (at both the metropolitan and federal levels) in Australia, Canada, and the United States. In most jurisdictions, complaints against the police were investigated solely or mostly by the police. With the improvements instituted and being planned for in our police complaints system, we consider that it will continue to serve Hong Kong well.

Status of the Covenant in Hong Kong law

93. Article 39 of the Basic Law provides that:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

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

Additionally, the BORO provides for the incorporation into the laws of Hong Kong of the provisions of the ICCPR as applied to Hong Kong. Those provisions are contained in the Bill of Rights, which forms Part II of the Ordinance.

94. In 2002,⁷ the Court of Final Appeal determined the approach to the interpretation of article 39 of the Basic Law and the provisions of the Bill of Rights:

“It is established that article 39, being part of Chapter III of the Basic Law, which provides for the fundamental rights and duties of the residents of the HKSAR, is to be given both a purposive and generous interpretation (*Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at pp.28D-29A, per Li CJ). The same approach is to be adopted to the provisions of the Bill as the object of those provisions is to guarantee the fundamental rights and freedoms of the residents of the HKSAR.”

Details of the case are explained in paragraphs 239 to 241 below, in relation to article 15.

95. The Court of Final Appeal further explained⁸ how the Covenant operates - under article 39 (2) of the Basic Law - to protect the rights and freedoms of Hong Kong residents:

“Article 39(2) is protective of the rights and freedoms of Hong Kong residents. Its provisions make it clear first, that such rights and freedoms may not be restricted unless as prescribed by law. Secondly, even if the restrictive measures are prescribed by law, article 39(2) provides that the restrictions shall not contravene provisions of the ICCPR as applied to Hong Kong, that is, as incorporated by the Bill. Thus, in the context of rights recognised by the ICCPR as applied to Hong Kong (whether or not such rights are also enshrined in the Basic Law), article 39(2) spells out two requirements, which any purported restriction must satisfy.”

96. In the same case, the Court also held that the Covenant as applied to Hong Kong - and as incorporated by the Bill of Rights - only provided for minimum standards for rights that are internationally recognised. The Basic Law can provide for rights additional to such minimum standards. It is to be noted that, pursuant to article 41 of the Basic Law:

“Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with the law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter.”

Thus, non-HKSAR residents who are in Hong Kong also enjoy the rights prescribed in the Covenant as applied to Hong Kong.

⁷ In *Shum Kwok Sher v HKSAR* [2002] HKLRD 793, at 809.

⁸ In *Gurung Kesh Bahadur v Director of Immigration* [2002] 2 HKLRD 775, at 784.

97. In addition to the provisions in Chapter III of the Basic Law (particularly article 39) and the Bill of Rights, the Covenant has effect in domestic law through:

- (a) Other provisions in the Basic Law (articles 8, 11, and 160: see paragraph 98 below);
- (b) Other ordinances; such as the three anti-discrimination laws; and
- (c) Administrative means.

98. Article 8 of the Basic Law provides for the continuation of the laws previously in force in Hong Kong, except for any that contravene the Basic Law and subject to any amendment by the legislature of the HKSAR. Article 11 provides that “no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this law”. Article 160 provides, inter alia, that “if any laws are later discovered to be in contravention of this, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.” Thus, any provision in domestic legislation enacted after the reunification that purported to restrict the rights and freedoms of Hong Kong residents and was not in conformity with article 39 (2) would contravene the Basic Law and could not be enforced by the Hong Kong courts.

99. Following the enactment of the BORO in 1991, we examined all then existing laws, amending those found to be inconsistent with the provisions of the BORO and thence the Covenant. All subsequent legislation had to be cleared by the then Attorney General’s Chamber (now the Department of Justice) for consistency with the BORO and, indeed, Hong Kong’s obligations under all the international human rights treaties that apply to it. In any event, articles 8 and 160 ensure that any provision in pre-1997 legislation that breached article 39(2) of the Basic Law would not be enforceable.

Effect of the Covenant in Hong Kong law

100. Commentators have called on the Government to make clear whether it accepts that the provisions of the Covenant have ‘full and immediate effect’. The position is as explained in the following paragraphs, some of which - for the sake of cohesive discussion and easy reference - reiterate information provided elsewhere in this report (for example in Part I, paragraphs 34 to 35).

101. In its General Comment No. 3,⁹ the Committee on Economic, Social and Cultural Rights took the view that:

“The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.”

⁹ Fifth session, 1990.

102. *In Chan Mei Yee and another v Director of Immigration*,¹⁰ the court - referring to an academic text¹¹ - observed that:

“In respect of ICCPR, the author stated that the obligations imposed on the States are absolute and immediate. They are absolute because they are not expressed as being limited either by the resources available to the State, or by reference to the means to be employed in performing them. They are immediate in that each State is bound to take the necessary steps to secure the human rights and fundamental freedoms concerned from the moment the treaty comes into force for that State.”

103. Thus, the balance of opinion is that the Covenant does impose immediate international treaty obligation on its State Parties. Under article 2 (2), the Parties undertake “to take the necessary steps ... or other measures as may be necessary” to give effect to the rights recognised in the Covenant. The BORO incorporates the provisions of the Covenant as applied to Hong Kong into our domestic law. Individuals who feel that the Government or any person acting on its behalf has violated their rights under the Bill of Rights and the Covenant may seek judicial remedy or relief from the Court. And, by virtue of the provisions of the Basic Law, our constitutional document, in particular article 39, any restriction of a Covenant protected right as applied to Hong Kong - and that contravenes article 39 - is a breach of the Basic Law.

¹⁰ HCAL No 77/1999, 13 July 2000.

¹¹ “*The International Law of Human Rights*” by Paul Sieghart.

Article 3: Equal Rights of men and women

Response to the 1999 concluding observations

104. In paragraph 16 of its concluding observations on the initial report, the Committee expressed the concern that:

“... the educational system in the HKSAR discriminates against girls in selection for secondary schools, that considerable differences exist in the earning levels between men and women, that women are under-represented in public boards and public offices, and that there is discrimination against women in the Small Home Policy. The HKSAR should adopt positive measures to overcome discrimination against women and should ensure equal pay for work of equal value.”

We address these concerns seriatim in the paragraphs that follow.

The education system

105. We are fully committed to both the principle and the practice of gender equality: in the schools and in all other spheres of life. The Committee’s concerns in this regard relate to the system for the transfer of students from primary to secondary schools, which is known as the Secondary Schools Placement Allocation system (the SSPA). When this was formulated, some 20 years ago, there was no intention that it should in any way discriminate between the sexes. On the contrary, it was designed specifically with a view to making due allowance for inherent imbalances in the natural maturation processes. These include the fact that - generally speaking - boys develop later than girls do.

106. In 2000, the EOC brought judicial review proceedings against the Director of Education, alleging that certain, gender-based, features of the SSPA discriminated against individual pupils on the ground of their sex and that the SSPA was therefore unlawful.¹ In June 2001, the Court ruled for the Commission. Those features were removed with effect from the 2002 allocation exercise and the system now fully conforms to the laws of Hong Kong.

Earning differentials: equal pay for work of equal value

107. In 1997, the EOC commissioned an inter-university research team to conduct a feasibility study on the implementation of equal pay for work of equal value in the context of Hong Kong. The team completed its report in October 1998. Since then, the EOC has convened two conferences to discuss the concept in the public arena. The first (March 2000) was essentially a local forum. At the second (October 2001), a panel of international experts shared their experience with local employers, human resources practitioners, policy-makers, labour representatives, and human rights activists. Also in 2001, the Government provided the EOC with funding to commission a study of the subject with a view to promoting its implementation

¹ There were three such features: the separate scaling of boys’ and girls’ internal assessment results, separate banding for boys and girls in the arrangement of the allocation order, and pre-determined gender quotas for co-educational secondary schools.

in Hong Kong. The study is being conducted in three phases. The first, which concerns the public sector, has been completed. The second and third will focus on the private sector. The EOC is studying the findings and will consider the way forward.

Advisory boards and committees

108. Currently (mid-2003), there are 8,600 places on the boards and committees for non-official members, of which women fill 20%. We endorse the Committee's view that there is a need for more balanced representation on the boards and committees and have taken proactive measures to that purpose. To that end, in 2002, all Government bureaux and departments were asked to review the memberships of advisory and statutory bodies with a low representation of women. In so doing, they were required to take gender perspectives into account when making recommendations for appointments. For benchmarking purposes, we have set a working target of at least 25% female membership. We will monitor progress with a view to raising the benchmark in the longer term in line with international norms. There is also discussion of these issues in paragraphs 120 to 124 and paragraphs 310 to 312 of our second report under the CEDAW, in relation to articles 7 and 14 of that Convention.

109. Also in 2002, we conducted a special exercise, inviting women² to express interest in contributing to the work of the boards and committees, and to enter their personal data in the Government database so as to enlarge the pool of potential female candidates for appointments.

110. There is further discussion of the advisory boards and committees in paragraphs 349 to 351 below, in relation to article 25.

Women in public office

111. In paragraph 77 of the initial report, we explained how the number of women in the civil service directorate had steadily increased during the 1990s. That trend has continued. The number of female directorate officers in the Civil Service has increased from 129 (10.2%) in 1992, to 244 (18.9%) in 1997, and to 347 (24%) in 2002. In June 2003 (the cut-off date for this report), 24.1% of all directorate officers were women: 27.5% higher than 1997 and 136.3% higher than 1992. The percentage of female staff in the Civil Service stood at 33.7% in June 2003. Among the 19 Principal Officials,³ both the Secretary for Justice and the Secretary for Environment, Transport and Works are women. So, too, is the Ombudsman.

112. Directorate officers and officers who are serving outside the Region in our Economic and Trade Offices, often represent the HKSAR at the international level. There are 11 such Offices; female officers head four of them. Women have actively represented the HKSAR Government in the work of international organisations and have contributed substantially to international fora organised by such institutions as Asia-Pacific Economic Co-operation, the World Trade

² The women so invited included members of NGOs, chambers of commerce, and professional bodies.

³ See paragraph 25 in Part I of this report.

Organisation, and the World Health Organisation. And many women have been members of the HKSAR Government teams that attend the hearings of our reports under the international human rights treaties.

The Small House Policy

113. The position is as explained in paragraph 309 of our second report under the CEDAW, in relation to article 14 of that Convention.

Other developments

114. The following paragraphs advise the Committee of significant developments in relation to the advancement of women in areas that were not specifically discussed in the 1999 concluding observations.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

115. Our work to fulfil our obligations under the CEDAW and to advance the status of women in Hong Kong are explained in detail in our second report under the Convention, which is to be submitted as part of the China's fifth periodic report. We will provide the Committee with copies before the hearing of the present report.

The Women's Commission

116. We established the Women's Commission in January 2001 to demonstrate our commitment to promoting the well being and interests of women in Hong Kong. The Commission is a central mechanism and advises the Government on a strategic overview of women issues. Its remit is to identify women's needs and to address their concerns holistically and systematically. To those ends, it has developed a long-term vision and strategy for the development and advancement of women in Hong Kong. Its programme of work is described in summary form in paragraphs 3.2 to 3.6 of our second report under the ICESCR in relation to article 3 of that Covenant. It is discussed in greater detail in paragraphs 15 to 24, 28 to 35, 38, and 45 in relation to articles 2, 3, and 4 of that Convention.

Women in rural elections

117. We addressed this issue in paragraphs 72 and 73 of the initial report, in relation to article 3. But the subject has wider implications that go beyond the question of gender equality and we consider it more appropriate to address it under article 25: see paragraphs 352 to 359 below.

Sex Discrimination Ordinance

118. The position is essentially as explained in paragraph 3.7 of our second report under the ICESCR, in relation to article 3 of that Covenant.

Article 4: Public emergencies

119. The position is as explained in paragraphs 88 to 92 of the initial report. But commentators have said that proposals to introduce legislation to give effect to article 23 of the Basic Law have a bearing on the question of public emergencies. For coherence of discussion, those proposals are discussed in paragraphs 381 to 396 below. The latter form a special chapter (Chapter 28) that we have added in order adequately to address this complex and high profile subject, without unduly over-burdening the chapters that address individual articles of the Covenant. As we emphasise there, article 23 of the Basic Law imposes a constitutional duty on the HKSAR to legislate on its own to protect national security. We cannot envisage how such a law, which must comply with the provisions of the Basic Law (specifying that both the provisions of the Covenant and those of the ICESCR as applied to Hong Kong shall remain in force), would infringe the provisions of article 4.

Article 5: Prohibition on the destruction of any rights and freedoms recognised in the Covenant

120. The position is as explained in paragraph 93 of the initial report. But a commentator has said that proposals to enact legislation to give effect to article 23 of the Basic Law (BL23) would amount to the destruction of rights and freedoms recognised in the Covenant, particularly those in articles 4, 14, 17 to 19, 21 and 22.

121. For the reasons in paragraph 119 above in relation to article 4, this concern - and others that have been expressed in regard to the BL23 proposals - are addressed in the special chapter referred to in paragraph 119. However, we take this opportunity to advise the Committee that, for the reasons explained in chapter 28, the proposals do not destroy, diminish, or compromise any of the rights in the Covenant. Were they to do so to any extent whatever, they would be unlawful and in breach of the Basic Law.

Article 6: The Right to Life

Deaths in police custody

122. The procedures are as explained in paragraphs 98 and 99 of the initial report.

123. Between 1 July 1998¹ and 30 June 2003, 18 persons died in the official custody of the Police. The Coroner examined all 18 cases and found none of them to be caused by unlawful killing. Five of the deceased were found to have committed suicide, seven to have died by natural causes, and three by accident. The Coroner brought an open verdict in the remaining three cases.

124. In response to recommendations by the Coroner in respect of some of the 18 cases, the Police have introduced improved procedures in relation to the detention of persons. Examples include the introduction of frequent but irregularly timed cell checks, enhanced training of police officers in the handling of detained persons, and the installation of close circuit televisions inside the cell complex to control access to cell blocks.

Deaths in custody of the Correctional Services Department

125. Procedures are essentially as explained in paragraph 101 of the initial report.

126. Between 1 July 1998 and 30 June 2003 (the period covered by this report), 105 prisoners died in custody. To date, 91 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. Among the 91 cases, 15 of the deceased were found to have committed suicide, 72 to have died by natural cause and the Coroner brought open verdicts in the remaining four cases. The Coroner's Court has given recommendations in 24 out of the 91 cases.

127. The Department takes every possible measure to prevent deaths in custody. Task groups - comprising mainly but not exclusively Correctional Service officers² - are appointed to inquire into each case of death. Their and the Coroner's recommendations will be put into effect if they are considered appropriate.

128. Examples of measures that have been taken in response to recommendations by either the task groups or the Coroner include the early identification of inmates requiring special attention, regular monitoring and observation, installation of close circuit televisions, modification of cells and building infrastructure, and regular staff training.

¹ The 'cut-off' date for the initial report was 30 June 1998. Paragraph 123 updates the information in paragraph 100 of that report.

² Examples of non-Departmental members of a task group include a Justice of the Peace and a representative of the Hospital Authority.

Death in custody of the Customs and Excise Department

129. There was one such death in the period covered by this report. It occurred in 1999. The Coroner found no misconduct on the part of the Department.

Death in custody of the Immigration Department

130. There was one such death during the reporting period. It occurred in May 2003, when a Korean male - who was detained pending removal at the Immigration Detention Quarters, Hong Kong International Airport - committed suicide by hanging. The inquest into his death was still in progress when we were finalising this report.

Death in custody of the Independent Commission Against Corruption

131. There have been no deaths during the reporting period.

Concluding observations of November 1999

132. In paragraph 14 of its concluding observations on the initial report, the Committee expressed concern in regard to persons facing deportation from Hong Kong and their rights under articles 6 and 7 of the Covenant. Those concerns are addressed in paragraphs 141 to 142 below, in relation to article 7.

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

Instances of the alleged use of torture

133. In the period covered by this report (1 July 1998 to 30 June 2003), there have been no reports of torture as defined in the Crimes (Torture) Ordinance (Chapter 427) involving the Immigration Department, the Correctional Services Department, the Customs and Excise Department, the Hong Kong Police Force or the ICAC.

134. In paragraphs 109 to 112 of the initial report, we discussed the case of four Police officers who were found guilty of assaulting a drug addict to force a confession. We take this opportunity to inform the Committee that all four officers received custodial sentences and have been dismissed from the Police Force.

Extradition and the Fugitive Offenders (Torture) Order

135. The position is as explained in paragraphs 113 to 115 of the initial report.

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

Police

136. The position is as explained in paragraph 116 of the initial report.

Immigration Department

137. The position is as explained in paragraph 119 of the initial report.

Correctional Services Department, Customs and Excise Department, and the Independent Commission Against Corruption

138. The position is as explained in paragraphs 117 to 124 of the initial report.

Protection for patients detained under the mental health legislation

139. The position is essentially as explained in paragraphs 125 to 129 of the initial report.

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

140. The position is essentially as explained in paragraphs 134 to 138 of the initial report.

Persons facing deportation

141. In paragraph 14 of its concluding observations on the initial report, the Committee said that:

“In the light of the fact that the Covenant is applied in HKSAR subject to a reservation that seriously affects the application of article 13 in relation to decision-making procedures in deportation cases, the Committee remains concerned that persons facing a risk of imposition of the death penalty or of torture, or inhuman, cruel or degrading treatment as a consequence of their deportation from HKSAR may not enjoy effective protection. In order to secure compliance with articles 6 and 7 in deportation cases, the HKSAR should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment.”

142. We appreciate the Committee’s concerns. But we believe that our reservation against article 13 of the Covenant does not in any way compromise the position of persons facing deportation. As a matter of law, they have ample opportunities to make representations against deportation. That is, they may:

(a) Lodge objections against the decision with the Chief Secretary for Administration within 14 days, for consideration by the Chief Executive in Council. Where justified, deportation orders may be suspended or rescinded. And the most careful consideration is given to claims that the deportees could face the death penalty, or torture or inhuman, cruel or degrading treatment as a consequence of their deportation;

(b) Apply to the Court for judicial review; and

(c) Petition the Chief Executive under article 48 of the Basic Law for the suspension or rescission of their deportation orders.

Article 8: No slavery or servitude; no forced or compulsory labour

General

143. The position is essentially as explained in paragraphs 139 to 149 of the previous report. But there have been developments in regard to the employment of foreign domestic helpers that we will address in this section of the report, though they do not in any sense entail slavery, servitude, forced, or compulsory labour.

The minimum allowable wage for foreign domestic helpers

144. Most Hong Kong employees freely negotiate their remuneration packages with their employers. But - as a special safeguard and to protect local employees from competition from cheap imported labour - foreign domestic helpers, uniquely in Hong Kong, receive a 'minimum allowable wage' ('the wage').

145. The wage is subject to annual review, a process that takes account of Hong Kong's overall economic and employment situation against a basket of economic indicators. In the past three decades, the wage was adjusted 18 times. All but one were upwards, five entailing increases of over 20%.

146. In February 2003, on the basis of the recently completed annual review, the decision was taken to reduce the wage by HK\$400 (or 10.9%) from HK\$3 670 (US\$470.5) to HK\$3 270 (US\$419.2) with effect from 1 April 2003. The level of reduction reflected, inter alia:

(a) A drop of 17% in the median monthly income of households that employ foreign domestic helpers;

(b) A fall in the median monthly employment earnings of workers in elementary occupations¹ by about 16%; and

(c) A rise in the seasonally adjusted unemployment rate from 6.3% to 7.2%, between February 1999 (when the wage was last adjusted) and end-2002.

The Employees Retraining Levy on employers of foreign domestic helpers

147. Since the early 1990s, employers of workers imported under the 'labour importation scheme' have paid an 'Employees Retraining Levy'.² The levy is used to finance the training and retraining by the Employees Retraining Board of local workers displaced by economic restructuring. In February 2003, we took the decision to impose the 'Employees Retraining Levy' on employers of foreign domestic helpers, with effect from 1 October 2003.

¹ Resident domestic helpers (including foreign helpers) are classified as "workers in elementary occupations", in line with the job classification recommended by the ILO.

² The levy is made under section 14 of the Employees Retraining Ordinance.

148. The decision to so extend the levy reflects the fact that, like their counterparts in other sectors who employ workers under the labour importation scheme, employers of foreign domestic helpers enjoy the benefits of services offered by overseas rather than local workers. We therefore considered it reasonable for them to contribute towards the training and retraining of the local workforce, particularly the lower skilled. The need for the levy was clearly demonstrated in a manpower projection commissioned by the Government in 2002, which indicates that, in 2007, there will be a surplus of some 140,000 workers, many with low levels of educational attainment. There is therefore a pressing need to train and retrain the local workforce to keep pace with Hong Kong's economic restructuring.

149. Commentators say that the levy amounts to a further de facto wage cut for the helpers because, they believe, unscrupulous employers will recoup it from their helpers' pay. This is not the intention and legal advice is that our policies comply fully with article 39 of the Basic Law³ and other local legislation, including the BORO. An employer who deducted the levy or any part of it from a helper's salary would be committing an offence under section 32 of the Employment Ordinance and would be liable to prosecution and, upon conviction, to a maximum fine of \$100,000 and one year imprisonment.

150. We regard the underpayment of foreign domestic helpers with equal seriousness and those who have been underpaid (or not paid at all) are encouraged to file claims against their employers. We also prosecute employers who are found to have acted in breach of the Employment Ordinance. And, in late 2002, the Labour Department established an Employment Claims Investigation Unit to expedite the investigation and prosecution of underpayment claims. In the first half of 2003, the Labour Department received 83 underpayment claims from foreign domestic helpers, where we issued 14 summonses and convicted and fined two employers. In another case, an employer was convicted and sentenced to four months imprisonment for conspiracy to defraud the Immigration Department by making a false representation that he would pay a foreign domestic helper the minimum allowable wage. It was not possible to take action against the employers involved in the other underpayment claims, either because of insufficient evidence, or because the complainants - having settled their cases through conciliation or the Labour Tribunal - were unwilling to act as prosecution witnesses.

³ Article 39 provides for the continued application of the ICCPR and the ICESCR as applied to Hong Kong.

Article 9: Liberty and security of person

The Law Reform Commission (LRC) Report on Arrest 1992

151. In paragraphs 152 and 154 of the initial report, we explained that the Administration had decided to implement improvement measures recommended by the LRC in relation to the powers of stop, search, arrest and detention. Since then, we have implemented almost all the recommendations capable of being effected through administrative means. The important ones include:

- (a) Publishing leaflets on the powers and procedures relating to stop, search, and arrest to enable the public better to understand their rights and duties;
- (b) Stating in lay terms the reasons for stop and search to the persons affected;
- (c) Appointing custody officers and review offices to ensure that persons in detention are treated properly and to review the need for further detention;
- (d) Progressively providing video interview rooms for greater transparency in the statement taking process and improving the admissibility of confession statements; and
- (e) Publishing regular statistics on stop, search, and road search by the Police, the Immigration Department and the Customs and Excise Department. We have also put in place the necessary legislation on the taking of intimate samples. We are processing the remainder of the accepted LRC recommendations.

Force Procedures Manual

152. Some commentators have asked why the Police 'Force Procedures Manual' is not a statutory document. The position is that Police powers are clearly prescribed and circumscribed by statute. Article 5 of the Hong Kong Bill of Rights gives domestic effect to the provisions of article 9 of the Covenant. When arresting or detaining a person, the Police must act in strict accordance with the BORO and the sections of the Police Force Ordinance (Chapter 232) relating to the powers to arrest, stop, search and detain. Persons arrested or under police custody are given a written notice detailing their rights, such as the rights to be provided with a list of solicitors, to be supplied with food, and to seek medical treatment. And information about Police powers is readily available on the Force's website. The Force Procedures Manual provides internal guidelines for the Police. It contains technical details of policing procedures and therefore cannot appropriately be disclosed to the public or embodied by statute. Our practices in this regard are consistent with those of major law enforcement agencies elsewhere.

Remaining Vietnamese refugees and migrants

153. As at 30 June 2003, 1,396 eligible Vietnamese refugees and migrants had been granted stay in Hong Kong under the 'Widened Local Resettlement Scheme', which we introduced in February 2000. The Scheme allows remaining refugees and migrants - who are unlikely to be accepted for overseas resettlement or for return to Vietnam - to apply for settlement in Hong Kong.

Ex-China Vietnamese migrants

154. We explained the position of persons in this category in paragraphs 168 to 172 of the initial report. In April 2000, the Court of First Instance found for the Government in the judicial review proceedings initiated by 116 families against removal to Mainland China. After the families appealed, we agreed to an out-of-court settlement whereby all remaining ex-China Vietnamese were issued with Vietnamese refugee cards. A review is in process to devise a permanent resolution. But none of the remaining migrants in this category are currently subject to any order of removal and may work in Hong Kong while the review is in progress.

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

155. The reforms foreshadowed in paragraphs 173 to 175 of the initial report, including the establishment of a Guardianship Board, are now in effect.

Article 10: Right of persons deprived of their liberty

The right of prisoners: protection in law

156. The position is essentially as explained in paragraph 177 of the initial report.

Regulation and management of all penal establishments

157. There are now 24 correctional institutions rather than the 23 mentioned in the initial report. Otherwise the position is essentially unchanged. The objectives of imprisonment are as explained in paragraph 179 of the initial report.

Prison Rules: order and discipline in prisons

158. The position is as explained in paragraphs 180 to 183 of the initial report.

Rehabilitation of offenders

159. The position is as explained in paragraph 184 of the initial report.

Rehabilitation of juvenile offenders

Rehabilitation centres

160. In 2001, we enacted the Rehabilitation Centres Ordinance (Chapter 567). Inter alia, the Ordinance provides for the appointment of rehabilitation centres, which are a new form of institution for the reformation and training of offenders aged between 14 and 21 years. The centres first became operational - under the auspices of the Correctional Services Department - in July 2002. They provide an additional option for the courts when sentencing young offenders who are in need of a short-term residential rehabilitation programme. Thus, the Department now runs five different correctional programmes for the care and rehabilitation of offenders. These are described at Annex 4, which updates Annex 9 of the initial report.

The Community Support Services Scheme

161. In September 2001, the scheme explained in paragraph 187 of the initial report was strengthened by the creation of three additional Community Support Services Scheme teams, bringing the total number of teams to five. Their clientele are young people who have infringed the law or are in need of welfare services. The services they provide are as described in paragraph 187 of the initial report.

Rehabilitation: philosophy of 'through care'

162. The philosophy is as explained in paragraphs 188 and 189 of the initial report. The recommendations of the research study explained in paragraph 189 of the initial report have since been fully implemented. This has entailed:

- (a) Introducing multi-media learning centres in all institutions for young offenders;

- (b) Encouraging inmates to sit for public examinations;
- (c) Completing a structural review of the Department's teaching staff;
- (d) Conducting courses to train teachers in the proper handling of emotional and behavioural problems of young offenders; and
- (e) introducing a multi-media learning centre and new language/computer courses in one of the institutions.

163. In the course of these improvements, the Department upgraded its vocational training programmes to provide craft level training¹ to increase inmates' employability after their release. The process was completed in January 2003.

164. In November 1999, the Commissioner of Correctional Services established the Committee on Community Support for Rehabilitated Offenders. The Committee's function is to obtain community support for rehabilitating the re-integration of former offenders into the community. It also advises the Commissioner on rehabilitation programmes and publicity strategies. Its members comprise community leaders, employers, education workers, professionals and representatives of NGOs, and Government departments.

Supervision and aftercare services for young offenders

165. The position is as explained in paragraphs 190 to 198 of the initial report.

Complaints against the Correctional Services Department

166. The position is essentially as explained in paragraphs 199 to 201 of the initial report. However, in August 2002, the Complaints Investigation Unit of the Correctional Services Department received ISO 9001: 2000 accreditation.² The findings of the investigation are scrutinised by the Correctional Services Department Complaints Committee.³

¹ The training is conducted in some 26 workshops offering a selection of 15 trades.

² ISO 9001:2000 is a standard in the ISO 9000 series. The series prescribes the methods that an organisation can use to ensure that the customers' requirements are fully met. Its objective is to assure that an organisation's products and/or services consistently measure up to a *fitness for purpose* test.

³ Formerly known as the Case Review Committee. The nomenclature change (made in July 2000) reflects the fact that the Committee not only reviews cases but also examines them, in accordance with ISO quality management system requirements in respect of the monitoring and measurement of products.

Justices of the Peace (JPs)

167. We explained this programme in paragraphs 202 and 203 of the initial report. Since then, following a review in 1999, we have made several improvements to the visiting system:

(a) The surprise element has been enhanced, with the institutions concerned receiving no advance notice of the exact timing of a visit;

(b) We have amended Rule 222(1) of the Prison Rules (Chapter 234 sub. leg.), Rule 6(1) of the Immigration (Vietnamese Migrants) (Detention Centres) Rules (Chapter 115 sub. leg.) and Rule 42(1) of the Probation of Offenders Rules (Chapter 298 sub. leg.) to allow non-official JPs to pair up when visiting institutions. Previously, visits had to be conducted by JP pairs comprising an official and an unofficial;

(c) JPs now receive more pre-visit information on outstanding complaints than they previously did; and

(d) JPs may choose to visit a particular type of institution more frequently for better monitoring.

Complaints to the Ombudsman

168. The position is essentially as explained in paragraphs 204 and 205 of the initial report. Between 1 July 1998 and 30 June 2003, the Ombudsman received 1,744 complaints against the Correctional Services Department:

1998 (1 July)	210
1999	350
2000	339
2001	382
2002	355
2003 (30 June)	108
Total	1 744

One of these complaints was partially substantiated.

Young offenders detained at Executive discretion (formerly “at Her Majesty’s pleasure”)

169. Currently, there are 12 prisoners in this category, which we explained in paragraphs 209 and 210 of the initial report.⁴ The Chief Executive has determined minimum terms for all of them, in accordance with section 67C of the Criminal Procedure Ordinance (Chapter 221).⁵

⁴ At that time (June 1998), there were 15 such prisoners. Three of those have since received determinate sentences by the Chief Executive on the recommendation of the Long-term Prison Sentence Review Board.

⁵ See paragraph 210 of the initial report.

170. In 2001, two prisoners in this category applied for judicial review to challenge the provisions in the Criminal Procedure Ordinance and the Long-term Prison Sentences Review Ordinance (Chapter 524)⁶ that govern the determination of minimum terms and the regular review of indeterminate sentences. They argued that the determination of minimum terms by the Chief Executive was inconsistent with article 80⁷ of the Basic Law (BL80) and contravened article 14(1) of the Covenant. They also argued that the sentence review system deprived prisoners of their right to have the lawfulness of their detention reviewed before a court, as guaranteed by article 9(4) of the Covenant.

171. The Court of First Instance held that the determination of minimum terms was inherently a judicial power and therefore section 67C was inconsistent with BL80. We now intend to amend Chapter 221 by vesting the Judiciary with the power to determine the minimum terms of this category of prisoners.

172. However, the Court refused to grant a declaration that section 67C was inconsistent with article 10 of the Bill of Rights, which corresponds to article 14(1) of the Covenant, on the grounds that section 67C is not concerned with the determination of a criminal charge. It also refused to grant a declaration that section 12(2) of the Long-term Prison Sentences Review Ordinance was inconsistent with article 5(4) of the Bill of Rights, which corresponds to article 9(4) of the Covenant. This was because habeas corpus proceedings may be employed effectively and fully to protect the applicants' rights to liberty and security of the person. The two applicants have since served notice of appeal against the ruling. As at 30 June 2003, the closing date for this report, their appeal was pending.

Prison overcrowding

173. In paragraph 216 of the initial report, we informed the Committee that, in 1997, Hong Kong's penal institutions held an average of 15% more prisoners than their certified capacity. By the end of 2002, the level of overcrowding had fallen to 11%. Nevertheless, all facilities in such institutions continue to conform to the relevant provisions in the United Nations Standard Minimum Rules for the Treatment of Prisoners.

174. We are taking steps to address the problem of overcrowding in accordance with our policy of holding offenders in a manner that:

- (a) Ensures public security;
- (b) Is safe for the inmates;
- (c) Is compatible with human dignity; and

⁶ See paragraph 209 of the initial report.

⁷ BL80 provides that "the courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region".

(d) Provides the best possible opportunity for the rehabilitation of all inmates with a view to their reintegration into society.

175. To achieve these objectives, we need adequate penal capacity and supporting facilities. We have examined numerous options and have arrived at the view that, in the circumstances of Hong Kong where land space is very limited, the most promising approach would be to co-locate most or all of our existing penal institutions in one place. Prima facie, this offers the prospect of security, modern standards of accommodation and facilities, and the opportunity to 'pool' services (such as educational/vocational opportunities) for the benefit of inmates. A study now in progress is examining the feasibility of this concept. If the study concludes that the proposal is feasible, the new institution would enable us to address the problem of overcrowding by replacing 4,600 existing penal places and increasing capacity by an additional 2,600 places, bringing total provision to 7,200. This would eliminate the existing problem and provide sufficient capacity to meet the forecast growth of the penal population in the coming decade.

176. Commentators have asked whether co-location is in the best interests of the inmates. We consider that it would be. As indicated in paragraph 118, the aim is to address the problem of overcrowding and to meet the projected growth of the penal population. If the proposal is implemented, inmates will have more living space and better facilities. And improved access to education and vocational training would serve to ameliorate their opportunities for rehabilitation and reintegration into society.

Minority prisoners

177. As at 30 June 2003, there were 1,016 persons of 'other nationality' (a statistical classification) in Hong Kong prisons. Commentators have asked what special measures or services are in place for them. The position is that their treatment and rehabilitation programmes are the same as those for local prisoners and are in accordance with the United Nations Standard Minimum Rule for the Treatment of Prisoners. However, special dietary requirements (halal, vegetarian, and so forth) are met on request. There are regular religious services for followers of the major religions. The needs of other faiths are met, where possible, on request. Hong Kong has arrangements with seven countries,⁸ whereby we automatically informed their consulates if their nationals are taken into custody.⁹ We do so for other nationals only on request. This is for the protection of their personal privacy.

⁸ Australia, Canada, India, Italy, the UK, the USA and Vietnam.

⁹ Unless a prisoner expressly objects to our doing so.

Article 11: No imprisonment for non-fulfilment of contract

178. The position is essentially as explained in paragraphs 217 to 221 of the initial report.

Article 12: Liberty of movement

Legal protections

179. The situation remains essentially as explained in paragraphs 222 to 225 of the initial report in respect of the legal protections on freedom of movement and the right to leave Hong Kong.

Hong Kong travel documents

180. Article 154 of the Basic Law authorises the HKSAR Government to issue HKSAR passports to all Chinese citizens who hold Hong Kong permanent identity cards (persons who hold such cards have the right of abode in Hong Kong). The Hong Kong Special Administrative Region Passports Ordinance (Chapter 539) prescribes the detailed rules for the processing and issue of HKSAR passports: these are reproduced at Annex 5.

181. 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 2003, the Department had issued about 2.3 million HKSAR passports since their introduction in July 1997. The passport is well regarded internationally: as at 30 June 2003, 124 countries/territories had granted visa-free access to its holders.

Travel documents for non-permanent residents

182. The position is essentially as explained in paragraph 229 of the initial report.

Right of abode

183. As explained in paragraph 230 of the initial report, article 24 of the Basic Law (BL24) prescribes the categories of persons who are permanent residents of the HKSAR and therefore qualified to obtain, in accordance with the laws of the Region, permanent identity cards that state their right of abode. Judgments of the Court of Final Appeal in litigation concerning the interpretation and implementation of BL24 since the reunification have established a firm legal basis for the HKSAR Government to deal with cases concerning the right of abode.

The Certificate of Entitlement (CoE) and the One-way Permit system

184. In paragraph 233 of the initial report, we explained the purpose and operation of the CoE Scheme and its inter-relationship with the One-way Permit system.¹ Under the Scheme, the verification of a right of abode claim is conducted whilst the person making the claim remains outside Hong Kong. As at 30 June 2003, the Scheme had ensured the speedy and orderly

¹ See also paragraphs 10.9 to 10.14 of our second report under the ICESCR, in relation to article 10 of that Covenant.

admission for settlement of about 139,000 children whose right of abode in Hong Kong had been verified. And, since the reunification, over 329,000 Mainlanders, including the 139,000 CoE holders referred to above, had settled in Hong Kong under the one-way permit system.

185. As explained in paragraph 10.11 of our second report under the ICESCR in relation to article 10 of that Covenant, there are numerous channels for Mainlanders to visit Hong Kong while they are waiting for approval to enter for settlement. Since finalising that report, there have been further improvements to those arrangements that enable Mainlanders with appropriate visit endorsements to enter Hong Kong to visit spouses and parents and spend more time in Hong Kong in the capacity of visitors than they previously could.

186. In paragraph 10 of its concluding observations on the initial report, the Committee expressed serious concern “at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24(2)(3) of the Basic Law by the NPCSC (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the *Ng Ka Ling* and *Chan Kam Nga* cases, which placed a particular interpretation on article 24(2)(3) “. The Committee had noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, it remained concerned “that a request by the executive branch of government for an interpretation under article 158(1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14”.²

187. Commentators have expressed concern about the absence of a Government undertaking never again to seek such an interpretation. They consider that this poses a continued threat to judicial autonomy in the HKSAR and demonstrates a lack of respect for the independence for the Judiciary and the rule of law. Before responding to this view (see paragraphs 191 to 196 below), we think it will be helpful if we first explain the background to the decision to seek the interpretation of June 1999.

The 1999 request for an interpretation: background

188. We requested the interpretation pursuant to article 158(1) of the Basic Law, which provides that “the power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.”

Article 158(3) of the Basic Law further provides that:

“The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship

² We address the Committee’s concern about the right to a fair trial in paragraphs 210 and 211 below in relation to article 14.

between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.”

189. In January 1999, the CFA heard the cases of *Ng Ka Ling and Chan Kam Nga*,³ which we discussed in paragraphs 234 to 241 of the initial report, in relation to decisions of the lower courts. The Court concluded that it was not required to refer articles 22(4) and 24(2)(3) of the Basic Law to the NPCSC for interpretation. Subsequently, however, in the preamble to its interpretation of those articles (June 1999), the NPCSC stated that, before making its judgment, the CFA had not sought its interpretation in compliance with article 158(3). Nor did the NPCSC consider the CFA's interpretation to be consistent with the legislative intent. Subsequently, in the case of *Lau Kong Yung*⁴ (December 1999), the CFA confirmed that the NPCSC's interpretation was constitutionally valid and binding on the court.

190. In January 2002, in the case of *Ng Siu Tung, Li Shuk Fan and Sin Hoi Chu*, the CFA laid down a firm legal basis and clear criteria for resolving the question as to who was entitled to the benefits of the CFA judgments in *Ng Ka Ling* and *Chan Kam Nga*. Claimants who cannot benefit from those judgments must leave Hong Kong and those who refuse to leave voluntarily will be repatriated in accordance with the law.⁵ As at 30 June 2003, about 910 right of abode claimants were still in Hong Kong. Of those, about 510 had not reported for scheduled removal and about 170 were engaged in on-going legal proceedings.

Response to commentators

191. It is against this background that we have explained in numerous speeches and articles (copies of which can be supplied if the Committee so wishes) why we believe that the request for an NPCSC interpretation was lawful and constitutional. We have considered the arguments of

³ *Ng Ka Ling & Others v Director of Immigration* (judgment of the Court of Final Appeal dated 29 January 1999) [1999] 1 HKLRD 315. And *Chan Kam Nga & Others v Director of Immigration* (judgment of the Court of Final Appeal dated 29 January 1999) [1999] 1 HKLRD 304.

⁴ *Lau Kong Yung & Others v Director of Immigration* (judgment of the Court of Final Appeal dated 3 December 1999) [1999] 3 HKLRD 778.

⁵ This is subject to the doctrine of legitimate expectations and other legal principles expounded by the CFA in *Ng Siu Tung*'s case.

those who assert that it is unlawful or unconstitutional for the Chief Executive to seek an interpretation from the NPCSC. But we do not consider that those arguments provide reasons for us to make the undertaking that their proponents desire. On the contrary:

(a) In its judgment of December 1999, the CFA made no adverse comment on the Chief Executive's request for the interpretation. Rather, it confirmed that the interpretation of the NPCSC was a valid and binding interpretation of articles 22(4) and 24(2)(3) of the Basic Law, which the courts of the HKSAR were under a duty to follow in the future;

(b) In the same judgment, the CFA also held that, "It is clear that the [NPCSC] has the power to make the interpretation. This power originates from article 67(4) of the Chinese Constitution and is contained in article 158(1) of the Basic Law itself. The power of interpretation of the Basic Law conferred by article 158(1) is in general and unqualified terms. That power and its exercise is not restricted or qualified in any way by articles 158(2) and 158(3)"; and

(c) Under Hong Kong's new constitutional order, the Chief Executive is head of the HKSAR and represents the Region. Article 43 of the Basic Law (BL43) provides that the Chief Executive is accountable to the Central People's Government and the HKSAR in accordance with the Basic Law. And under BL48(2), the Chief Executive is responsible for the implementation of the Basic Law. These powers do not conflict with independent judicial power, including that of final adjudication, which are guaranteed by articles 2 and 19 of the Basic Law. They are constitutional duties from which we cannot lawfully detract. Nor can we lawfully retract from the NPCSC's constitutional power to interpret the Basic Law.

192. For these reasons, we consider that the request for an interpretation was lawful and constitutional. But, as we have repeatedly emphasised, we will not seek an NPCSC interpretation save in wholly exceptional circumstances.

193. Commentators have also called on us to devise some form of mechanism or criteria to restrict the circumstances in which we may seek a further interpretation. There are, however, many factors that must be taken into account. We hope that we will not again face problems as substantial as those that arose in respect of the right of abode, and that it will not be necessary for the Chief Executive to seek an NPCSC interpretation. But it is not possible to predict whether circumstances might engender such problems and so justify such a request. And the Chief Executive has a constitutional duty to implement the Basic Law and to account to the Central People's Government and the HKSAR.⁶ In these early days of our new constitution, it is only prudent to proceed cautiously. And, at the risk of repetition, there is no basis for the fear that another request for interpretation would be lightly made or accepted.

⁶ Under article 43 of the Basic Law.

194. For much the same reasons, we reject the view that the request for the interpretation has compromised the independence of the Judiciary and/or the rule of law. As indicated above, the interpretation was made in accordance with our new constitutional order and:

(a) The powers of the CFA have not been diminished and the Court retains its power of final adjudication;

(b) Pace assertions to the contrary, the NPCSC does not hear appeals from the court; and

(c) Nor does the NPCSC decide individual cases. Its interpretation of the Basic Law did not affect the rights of the parties to the proceedings that were decided by the court in January 1999. Rather, it changed only the principles that were to be applied to claims by other persons for right of abode that were pending at the time or were made subsequently.⁷ In other words, the CFA remains our supreme judicial body. And its adjudication of cases is not subject to appeal to any other body.

Further considerations

195. To put the issues in their proper perspective:

(a) The NPCSC's power of interpretation relates only to the Basic Law. Very few cases require an interpretation of that Law as most legal disputes and proceedings concern common law or statutory principles. The interpretation of those principles is exclusively in the domain of the Hong Kong courts;

(b) Fundamental principles - such as the independence of the Judiciary, the power of SAR's courts to refer to the precedents of other common law jurisdictions, and respect for human rights - are entrenched in the Basic Law; and

(c) Our position on the issues is not solely that of the executive arm. Since the 1999 interpretation, several senior judges (including one Permanent Judge of the CFA and two judges of the High Court) have, at the time of their retirement, confirmed that there has not been any interference with judicial independence since the reunification. All agreed that the 1999 interpretation did not erode the rule of law and that there was no threat to judicial independence.

Conclusion

196. The rule of law and the independence of the Judiciary are cornerstones of Hong Kong's way of life and we are committed to protecting and strengthening them. The concerns that were raised in 1999 were understandable. But subsequent events have demonstrated that the

⁷ The applications of these principles to such claims would be subject to the doctrine of legitimate expectations and other legal principles expounded by the CFA in Ng Siu Tung (paragraph 190 above).

Government's commitment to and respect for the rule of law and the independence of the Judiciary is unconditional. Thus, it is groundless to suggest that the judicial autonomy in the SAR was or continues to be threatened.

Lawful entry into Hong Kong

197. The position is essentially as explained in paragraph 242 of the initial report. But, in response to concerns that commentators have expressed about an immigration 'blacklist', we take the opportunity to point out that it is well established in international law that a state has the right to control the entry of non-nationals into its territory subject to its treaty obligations. This principle has received judicial approval from the European Court of Human Rights.⁸ Hong Kong's obligations under the Covenant are subject to a reservation that it continues to apply immigration legislation as regards those persons who have no right to enter and remain. The BORO includes an express exception in equal terms⁹ and our Court of Appeal has held that this prevents any persons without a right to enter or remain in Hong Kong from relying upon their rights under the Bill of Rights to challenge the lawful exercise of the powers of removal under the Immigration Ordinance.¹⁰

Assistance for Hong Kong residents in Mainland China

198. The position is broadly as explained in paragraph 245 of the initial report. But January 2001 saw the initiation of a reciprocal notification mechanism whereby the Mainland authorities will notify the HKSAR Government of cases where Hong Kong residents are subject to criminal compulsory measures implemented under the authority of the Mainland public security and customs authorities. In June 2003, the scope of these arrangements was extended to cases under the purview of the People's Procuratorates and the Ministry of State Security. On notification from the Mainland authorities, we inform the families of the detainees concerned and relay any requests or appeals from them to the Mainland authorities for action.

Assistance for Hong Kong residents in distress outside Hong Kong

199. Hong Kong residents in distress outside Hong Kong can obtain assistance from Chinese diplomatic and consular missions and/or the Immigration Department of the HKSAR Government as appropriate. Loss of travel documents is a common difficulty that is dealt with as a matter of standard procedure. Of more serious concern are cases where Hong Kong residents are detained or imprisoned.

200. Detainees and/or their families who require assistance have access to the Immigration Department's 24-hour hotline service. After contact is established, officers of the Department meet the families to learn the details of their cases. Except where the person has been detained

⁸ *Abdulaziz and others v The United Kingdom* (1985) 7 EHRR 471.

⁹ In section 11 of Part III of the BORO.

¹⁰ *Hai Ho Tak v Attorney General* [1994] 2 HKLR202.

in Mainland China (paragraph 198 above), appeals and requests are then relayed to the jurisdiction concerned through the Chinese Embassies and Consulates in the countries in question.

Boundary Facilities Improvement Tax

201. In the 2002-03 Budget, we announced our intention to introduce a tax - the Boundary Facilities Improvement Tax - on persons departing Hong Kong by land and sea (such a tax was already in place for air departures). The purpose was to help finance improvements to the facilities at the boundary between the HKSAR and Mainland China. Commentators have said that the tax would violate the freedom of movement. We do not agree with this view. Indeed, from the perspective of the freedom of movement, there is no difference between a boundary facilities improvement tax and the taxes/fees/tolls levied on the use of airports, highways, bridges, and tunnels in Hong Kong and in numerous other parts of the world. These charges, levied at a moderate level, should not have any significant effects on people's movements. We would further argue that as these taxes/fees/charges help finance the capital projects, they actually help to improve communication and movements of people. Were governments to act on our commentators' views, their alternatives would be either to:

- (a) Finance the facilities in question from other sources at the expense of other areas of social/infrastructural expenditure; or
- (b) Abandon proposed improvements, or even the facility itself; or
- (c) Allow the existing facilities to deteriorate through reduced maintenance, so compromising safety.

All alternatives would be to the detriment of some section of society. Alternatives (b) and (c) would be to the detriment of the freedom of movement.¹¹

¹¹ As we were finalising this report, the decision was taken to suspend action on the Bill to implement the proposal, in view of prevailing economic conditions. But we discuss the issue here because the proposal has not been abandoned and we considered that there was a need to address our commentators' concerns.

Article 13: Restrictions on expulsion from Hong Kong

Legal position

202. The position is as explained in paragraph 246 of the initial report.

Powers of removal and deportation under the Immigration Ordinance

203. The position is as explained in paragraphs 247 to 248 of the initial report.

Deportation

204. The table below provides a statistical breakdown of the deportation orders issued in the five years since the submission of the initial report. All were made after the immigrants concerned had been found guilty of offences punishable with imprisonment for not less than two years. No deportation order was made on the ground that the deportation was deemed to be conducive to the public good.

Year	Number of deportation orders issued	Number of petitions/objections against deportation orders and requests for rescission or suspension of deportation orders	Number of deportation orders rescinded or suspended
July 1998-Dec 1998	290	13	3
1999	690	25	19
2000	504	28	19
2001	584	41	11
2002	547	38	12
Jan 2003-Jun 2003	284	22	5

Removal

205. The position is essentially as explained in paragraphs 252 to 253 of the initial report. The statistics provided in paragraph 254 of that report are updated below. It will be seen that the number of removal orders increased in 2000 and 2001. This was mostly attributable to the large number of unsuccessful claimants for the right of abode in the HKSAR.

Year	Number of removal orders issued	Number of statutory appeals received (allowed) against removal orders
July 1998-Dec 1998	800	227 (1)
1999	1 801	489 (2)
2000	4 709	2 318 (3)
2001	4 925	3 352 (2)
2002	2 682	1 331 (0)
Jan 2003-Jun 2003	685	88 (0)

Immigration Tribunal

206. The position is essentially as explained in paragraphs 255 to 256 of the initial report.

207. Commentators have asked us to explain the legal grounds and proceedings for the arrest of two-way permit holders from Mainland China.¹ They have also asked us to explain whether there are any protective measures to prevent two-way permit holders from being illegally detained or repatriated. The position is that the laws of Hong Kong apply to all persons within the Hong Kong Special Administrative Region, including visitors. Two-way permit holders are visitors. If visitors are arrested or detained in Hong Kong, it is because they are reasonably suspected of having committed crimes here. The protective measures that the laws of Hong Kong provide for all arrested and detained persons apply equally to two-way permit holders.

Concluding observations of November 1999

208. In paragraph 14 of its concluding observations on the initial report, the Committee expressed concern in regard to the implications of our reservation under article 13 for persons facing deportation from Hong Kong and their rights under articles 6 and 7 of the Covenant. Those concerns are addressed in paragraphs 84 to 85 above, in relation to article 7.

¹ Two-way permits are issued by the Mainland authorities to Mainland residents wishing to visit Hong Kong for limited periods for tourism, business, or family reunion.

Article 14: Equality before courts and right to fair and public hearing

209. Some commentators have expressed the concern that proposals to enact legislation to give effect to article 23 of the Basic Law may compromise the rights and protections in article 14, as well as rights provided for in other articles of the Covenant. For cohesion of discussion, those concerns are addressed in paragraphs 381 to 396 below.

Interpretation of article 24(2)(3) of the Basic Law

210. In paragraph 10 of its concluding observations on the initial report, the Committee expressed serious concern “at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of article 24(2)(3) of the Basic Law by the NPCSC (under article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the Ng Ka Ling and Chan Kam Nga cases, which placed a particular interpretation on article 24(2)(3)”. The Committee noted our statement that we would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, it remained concerned “that a request by the executive branch of government for an interpretation under article 158(1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under article 14”.

211. We respectfully note the Committee’s concerns and, to re-emphasise what we have said in paragraphs 186 to 196 above in relation to article 12, repeat that we will not seek another such interpretation except in highly exceptional circumstances. We are committed to respecting the independence of the Judiciary and the right to a fair and public hearing under article 14 of the Covenant. For the reasons in paragraphs 188 to 196 above in relation to article 12, we remain firmly of the view that neither the request for an interpretation nor the interpretation itself undermined either that right or the independence of the Judiciary. Indeed, that right is a fundamental tenet of the common law system. It is also guaranteed constitutionally by virtue of article 39 of the Basic Law.

Court of Final Appeal

212. The position is essentially as explained in paragraphs 266 to 267 of the initial report. Between 30 June 1998 and 30 June 2003, the Court of Final Appeal received 366 applications for leave to appeal (184 criminal; 182 civil) and 144 substantive appeals (40 criminal; 104 civil).

‘Acts of state’

213. The position is as explained in paragraphs 271 to 273 of the initial report.

Bilingual charge forms

214. The position is explained in paragraph 70(c) above in relation to article 2.

Equal access to the courts

215. Commentators have said that the cost and time of litigation is unaffordable to ordinary citizens, unless they can obtain assistance. They consider this a threat to the principle of equal access to the courts. This view has been tested and rejected by the European Court of Human

Rights. The Court did not accept that, because legal aid for civil proceedings were not available, the right of access to a court was effectively denied and there was a violation of article 6 of the European Convention on Human Rights. In its judgment, the Court said that article 6 (the equivalent of article 14 of the Covenant) did not necessarily mean that free legal aid would have to be provided in all cases concerning civil rights and obligations. Everything would depend on the particular circumstances. It is a matter for States to determine the measures to be adopted to ensure effective right of access to court.¹

Recent development

216. That said, we recognise that there has been public concern that Hong Kong's civil justice system is excessively costly and prone to delays, and that litigation procedures are complex. In February 2000, those concerns prompted the Chief Justice to appoint a 'Working Party on Civil Justice Reform' to "review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed".

217. In November 2001, the Working Party issued an *Interim Report and Consultative Paper*. The Report explored possible options for change, including re-defining and simplifying procedural obligations, reducing the number of court hearings before trial, encouraging earlier settlement, making the cost of litigation more transparent, and giving the court more extensive and flexible powers to manage the progress of cases through the system. The consultation exercise took place between November 2001 and June 2002 and the final report is being prepared. We expect to make a public announcement some time in 2004,² when the report is ready for release.

Appeal mechanisms

218. Commentators have said that Hong Kong's laws grant the executive extensive powers to restrict the rights of the citizens. By way of example, they cite the Appeal Board on Public Meetings and Processions. The Board is established under the Public Order Ordinance.³ Section 16 of that ordinance enables the organisers of an event to appeal to the Board against a decision of the Commissioner of Police to prohibit a public meeting, to object to a public procession, or to impose conditions on the holding of such meeting or procession. They assert that the Board has only limited powers; and that its members - who are appointed by the

¹ *Airey v Ireland* (1979) 2 EHRR 305.

² The Working Party does not deal with matrimonial and family disputes, which represent a significant aspect of the civil justice system. Work to improve the way in which such disputes are managed is progressing in parallel. This includes a pilot scheme for the use of mediation in family disputes and a working group on the reform of ancillary relief procedures in matrimonial cases.

³ Chapter 245: the Board is constituted under section 44 with reference to section 43(3).

Chief Executive - are uninformed about international human rights principles, jurisprudence, and law. They therefore believe that the Board cannot effectively discharge its monitoring functions.

219. But the requirement under article 14(1) is that, in the determination of their rights and obligations in a suit at law, persons are entitled to fair and public hearing by competent, independent and impartial tribunals. The fact that the Chair or members of an appeal board are appointed by the executive does not affect its impartiality and independence if the persons so appointed are free from influence or pressure when carrying out their adjudicatory role. A diagnostic characteristic of an appeal body's independence is that its determinations or decisions are binding on the parties and cannot be altered by the executive. For the reasons in paragraph 220, we consider that the Appeal Board meets that test.

220. The Ordinance incorporates safeguards that ensure the Board's effectiveness and integrity as a monitoring body. For example, section 43 provides that the Chair of the Appeal Board shall be a retired judge, or an ex-magistrate with more than ten years' service. And the Deputy Chair and members must not be public officers. Section 44 further provides that members of the Board are to be selected in rotation from a panel of 15 persons. Every question in relation to the hearing of appeals is to be determined by the opinion of the majority of the members with the Chairman having a casting vote. If an appeal fails, appellants can challenge a police decision in the courts by way of judicial review.

Right of access to the legal system

Legal aid

221. In July 2000, following the policy review and consultations discussed in paragraph 291 of the initial report, we introduced measures to improve the legal aid services provided by the Legal Aid Department. These comprised:

(a) Increasing the statutory deductible allowances for living expenses in calculating the disposable income⁴ of an applicant: previously, deductible allowances were calculated according to the standard rate under the Comprehensive Social Security Assistance scheme (CSSA).⁵ Now, we calculate them on the basis of 35-percentile household

⁴ Regulation 2A of the Legal Aid (Assessment of Resources and Contributions) Regulations (Chapter 91 sub. leg.) provides that that applicants' financial resources shall be assessed by multiplying their monthly disposable income by 12 and adding their disposable capital to that sum. Disposable income is determined in accordance with Schedule 1 of the Regulations, disposable capital in accordance with Schedule 2.

⁵ The standard rate of the CSSA scheme is paid to different categories of applicants to meet their basic and general needs. This rate was used as the deductible allowance from the legal aid applicants' gross income.

expenditure.⁶ In 2000, when we introduced this measure, we estimated that it would increase the number of eligible households from around 800,000 (48% of all households) to around one million (58%);

(b) Extending the scope of legal aid services: in Coroner's inquests, we now provide legal representation to the deceased's next of kin, where the Director of Legal Aid considers that the interest of public justice so requires;⁷

(c) Empowering the Director of Legal Aid to reduce, or not to seek, interest on the charge on property preserved or recovered in proceedings on behalf of aided persons;⁸

(d) Reducing the amount of the maximum contribution under the Ordinary Legal Aid Scheme from 43% of an applicant's financial resources to 25%;⁹

(e) Reducing the contribution rate under the Supplementary Legal Aid Scheme from 15% to 12% or, in the case of settlement before delivery of a brief to counsel, from 7.5% to 6% of the damages obtained by the applicant;¹⁰ and

(f) Empowering the Director of Legal Aid not to discharge a legal aid certificate if he considers it not appropriate to do so even though the financial resources of the aided person exceed the prescribed financial eligibility limit.¹¹

⁶ Section 8 of Schedule 1 to the Legal Aid (Assessment of Resources and Contributions) Regulations prescribes that:

“(1) An amount equivalent to the 35-percentile household expenditure shall not be taken into account in relation to the person concerned and his dependants, if any.

(2) For the purposes of this rule:

(a) The expression “35-percentile household expenditure” means the level of expenditure of households of a particular size, excluding expenditure for rent, as obtained in the 5-yearly Household Expenditure Survey conducted by the Census and Statistics Department, so that 35% of the households of that size have household expenditure below that level and 65% of the households have household expenditure above that level.”

⁷ Legal Aid Ordinance, Schedule 2, Part I, section 3.

⁸ Legal Aid Ordinance, section 18A.

⁹ Legal Aid (Assessment of Resources and Contributions) Regulations, Schedule 3, Part I, (b).

¹⁰ Legal Aid (Assessment of Resources and Contributions) Regulations, Schedule 3, Part III.

¹¹ Legal Aid Regulations, sections 8(2)(fa), 2A, and 3.

222. We have also introduced a review system for the financial eligibility limits. This comprises:

- (a) An annual review to take account of inflation;
- (b) A biennial review of any changes in litigation costs; and
- (c) A five-yearly review of the criteria used to assess financial eligibility of legal aid applicants.

We concluded the first full review cycle in 2002 and consulted the Legal Aid Services Council (LASC) on the proposals arising therefrom. We are now discussing those proposals and related issues with the Legislative Council's Panel on Administration of Justice and Legal Services.

223. Section 26A of the Legal Aid Ordinance provides that a legal aid applicant who has been refused legal aid for an appeal to the Court of Final Appeal may seek a review of such refusal. The review should be initiated by notice to the Registrar of the High Court accompanied by a certificate by counsel stating that the person aggrieved has a reasonable prospect of success in the appeal and the grounds for that opinion. In 2002, we introduced a scheme whereby legal aid applicants who, having passed the Legal Aid Department's means test are refused legal aid, may obtain a counsel's certificate free of charge, and so to seek review of the decision to refuse aid before a Review Committee.

Legal aid applications

224. Commentators have said that the level of legal aid provision is inadequate and that the applications procedures are over-complicated. In these circumstances, they say, persons who consider that their rights have been violated may choose to tolerate the situation rather than go through the application process.

225. Our policy is to ensure that no one with reasonable grounds for taking legal action in a Hong Kong court - irrespective of nationality or place of residence - is prevented from doing so because of a lack of means. As legal aid is publicly-funded, the Director of Legal Aid must be satisfied that applicants are financially eligible and have reasonable grounds for bringing or defending the proceedings for which they are seeking legal aid. Applicants must therefore pass a means test and a merits test.

226. We do not consider that the process is over-complicated: the Legal Aid Department offers a 'one-stop service', whereby both tests and any interviews that may be necessary are conducted on the same day. Assessments are processed electronically and, on average, over 90% of the legal aid applications are processed within a standard processing time of three months.

227. In this context, commentators have asserted that, in June 2002, the Legal Aid Department had denied application forms to right of abode claimants. The assertion reflects a misunderstanding. It arose from an incident where the Department had considered the claimants' applications for damages against the Government for maladministration at the same time as it considered their intended applications for unconditional stay in the HKSAR. The

purpose of considering the two issues together was to save them the time and trouble of making separate and repetitious applications, and to avoid any possible delay to other right of abode claimants. Having considered the applications, the Department concluded that the claimants had no reasonable grounds for legal proceedings and accordingly refused their applications. Nevertheless, it made arrangements for them to appeal against its decision to the Registrar of the High Court. The matter was later referred to The Ombudsman who found that there had been no maladministration on the Department's part.

Legal aid in criminal cases

228. Commentators have also said that the Government should provide legal aid to persons charged for serious offences. In fact, legal aid is already provided in all types of criminal cases.¹² And, as explained in Part I of this report (paragraphs 37 to 39), the Director of Legal Aid has the discretion to waive the upper limits of the means test if he considers it in the interests of justice to do so.¹³ In cases involving murder, treason, and piracy with violence, it is mandatory for legal aid to be granted, subject to the means test, which the judge may waive. In other offences - provided that the applicant passes the means test - a judge may grant legal aid on merits even if the Director of Legal Aid has refused it.

Legal aid in discrimination cases and in cases of medical negligence

229. Commentators have called for legal aid to be granted in all cases involving discrimination or medical negligence. In relation to the latter, they consider that "restricted access to legal aid means that some victims of malpractice are barred from having a fair trial".

230. The position is that:

(a) Legal aid *is* available for proceedings under the anti-discrimination laws. If such proceedings involve a breach of the BORO, or an inconsistency with the ICCPR as applied to Hong Kong is an issue, the Director of Legal Aid may waive the upper limit of the applicant's financial resources when conducting a means test; and

(b) Medical negligence cases are covered by both the Ordinary Legal Aid Scheme (as discussed above and in Part I)) and the Supplementary Legal Aid Scheme that we explained in paragraph 283 of the initial report.¹⁴ Legal aid is granted provided that the applicant has satisfied both the means test and the merits test. Therefore, there is no question of restricted access to legal aid in medical negligence cases.

¹² By the Legal Aid Department for cases heard in the District Court or above, and by the Duty Lawyer Service for cases heard at the Magistrates' Courts; see also paragraph 41 in Part I of this report.

¹³ The Administrator of the Duty Lawyer Service also has such discretion.

¹⁴ Essentially, the supplementary scheme benefits persons who are financially better off than those who benefit under the ordinary scheme but not sufficiently so to meet the cost of litigation.

For these reasons, we consider that the existing arrangements provide access to justice for persons of limited means with meritorious grounds for taking or defending proceedings in the courts of Hong Kong.

The Legal Aid Services Council and the question of an independent statutory body for legal aid

231. We explained the role of the Council¹⁵ in paragraphs 292 to 294 of the initial report. Since then, commentators have continued to maintain that the Council is only a supervisory body without independent statutory power, and that its requests for more independent powers have not been met. Their view remains that there should be an independent legal aid authority.

232. In 1998, as explained in paragraph 294 of the initial report, the Council commissioned consultants to examine the desirability and feasibility of establishing such a body. In preparing their report to the Council, the consultants sought to determine whether key stakeholders considered that there was a lack of operational independence in the administration of legal aid. To that end, they interviewed the legal professional bodies, lawyers undertaking legal aid work, community groups, the clients and staff of the Legal Aid Department, and the general public. They concluded that, while there was some concern about the question of independence, the focus of that concern was a minority of sensitive cases that presented a particular challenge to the Government. They observed that “(i)t is generally acknowledged that legal aid is administered independently in the majority of cases, including many in which legal aid is granted to people with cases against the Government”.

Existing safeguards

233. Our commentators sometimes tend to overlook the safeguards that are already in place to ensure the independent administration of the legal aid service. These include:

(a) Legal aid applications are assessed by professional officers in strict accordance with the provisions of the Legal Aid Ordinance;

(b) In complicated public law litigation against the Government, the Legal Aid Department would, as a matter of practice, seek independent legal advice outside the Department.¹⁶ The Department then gives weight to that advice in reaching its decision. And all public law litigation (including judicial reviews against the Government, or Government-related bodies such as the Housing Authority) is assigned to lawyers in private practice. In criminal cases, aided persons are invariably represented by barristers in private practice. And, where appropriate, solicitors in private practice are assigned to act as advocates or instructing solicitors in criminal trials or appeals;

¹⁵ Established in September 1996 under the Legal Aid Services Council Ordinance (Chapter 489).

¹⁶ Unless there are precedents, or similar advice has previously been obtained on the issue.

(c) The approval of a directorate officer is required for refusal of legal aid in judicial reviews, and in cases involving immigration, the Bill of Rights, or the Supplementary Legal Aid Scheme. Where such aid is refused, the applicants are informed of the reasons and their statutory right of appeal under sections 26 and 26A of the Legal Aid Ordinance;

(d) Appeals against such refusals lie with the Registrar of the High Court, whose decision is final. If the Registrar disagrees with a decision of the Department, he will allow the appeal and legal aid will be granted to the applicant; and

(e) The Department operates a formal complaints system in addition to the statutory appeals system.

234. Commentators often suggest that any lack of independence - whether actual or perceived - would be removed with the establishment of an independent legal aid authority. But this view is flawed. As the LASC's consultants acknowledged:

“One of the great strengths [of Hong Kong's legal aid system] is that there is no ceiling on the expenditure of the LAD on legal services”, which “means that there are no funding constraints to prevent those who meet the statutory criteria from receiving legal aid”.

“In some [jurisdictions] where there are funding constraints there is a strong perception that the Government has sought to influence the legal aid authority's priorities in its use of limited funds by indicating its preferences for the administration of legal aid.”

“The absence of ceilings on the expenditure of the LAD on legal aid services removes mechanisms for Government intervention in legal aid administration that are observed on some other jurisdictions”.

235. On the basis of the consultancy findings, and bearing in mind the observations cited in paragraph 234, the LASC recommended the establishment of an independent legal aid authority funded by public revenue and, as now, with no ceiling on expenditure on legal services. But providing an infinite budget from public funds for a body that is independent from the Government entails questions about accountability and would clearly be inconsistent with the principles of sound public finance policy.

236. Indeed, research into the practices of other common law jurisdictions indicates that legal aid budgets for independent legal aid authorities are invariably finite. The establishment of an independent legal aid authority could actually jeopardise the interests of legal aid applicants.

237. It will be clear from the foregoing that we do not consider that a convincing case for an independent authority has been established. The Legal Aid Department continues to meet our policy objective of ensuring that our target clients receive the assistance they need. And the consultants' findings indicate that the administration of legal aid in Hong Kong is sufficiently independent for practical purposes, as evidenced by the funding of numerous cases against the Government.

Operation of the Legal Aid Services Council

238. In October 2000, having completed a review of its operations, the LASC proposed to the Government possible legislative amendments that would enhance its independence and address operational difficulties that it had encountered in the course of its work. Those proposals included the suggestions that:

(a) The LASC should be empowered to appoint its own staff: we will consider the need for a specific statutory provision for this purpose when we next have the opportunity to amend the LASC Ordinance;

(b) The LASC should be empowered to enter into its own contracts: again, we will consider the need for a specific provision when we next have the opportunity to propose changes to the LASC Ordinance. In the interim, the LASC's secretary is authorised to enter into contracts on behalf of the Government for purposes pertaining to the LASC. But, to put the question into perspective, the contracts concern such matters as cleansing services, office supplies, maintenance, and so forth. Hence, the current arrangements should by no means compromise the LASC's independence; and

(c) The Chief Executive should be empowered to extend the time for submission of the LASC's annual report: we will identify an opportunity to put this suggestion into effect.

Article 15: No retrospective criminal offences or penalties

Ng Ka Ling & Others v Director of Immigration

239. We discussed the retrospective effect of the Immigration (Amendment) (No. 3) Ordinance 1997 on the right of abode in paragraphs 233 and 234 (in relation to article 12) and 298 of the initial report. The No. 3 Ordinance was enacted on 10 July 1997 and was deemed to have come into operation on 1 July 1997. The question of the legal validity of the retrospective provisions in that Ordinance (see the initial report, paragraphs cited above) was finally decided by the Court of Final Appeal in 1999.¹

240. Before 10 July 1997, permanent residents by descent who had arrived in Hong Kong enjoyed the constitutional right of abode and were therefore entitled to land and remain. The No. 3 Ordinance introduced a scheme whereby their status as permanent residents could only be established by their holding a certificate of entitlement. As the No. 3 Ordinance was only enacted on 10 July 1997, those permanent residents could not have held the certificate of entitlement prior to that date. Without the certificate of entitlement, their status was treated as not established and they were regarded as not enjoying the right of abode. Thus, they had no right to land or remain in Hong Kong and their doing so would constitute criminal offences under section 38 of the Immigration Ordinance (Chapter 115), which prohibited landing or remaining without permission. If the retrospective provision was constitutional, its operation would have involved them retrospectively in the commission of criminal offences.

241. In *Ng Ka Ling*, the Court of Final Appeal took the view that article 15(1) of the Covenant as applied to Hong Kong remained in force by virtue of article 39 of the Hong Kong Basic Law. Article 15(1) of the ICCPR is identical to article 12(1) of the Bill of Rights. It was held that article 15(1) of the ICCPR was applicable and did render the retrospective provision of the No. 3 Ordinance unconstitutional. It had further been stated in the judgment that in the context of our legal system, the prohibition against persons being held guilty of retrospective criminal offences went further than prohibiting prosecution and conviction. It did strike at the retrospective provision itself and rendered it invalid.

¹ In *Ng Ka Ling & Others v. Director of Immigration* [1999] 1 HKLRD 577.

Article 16: Right to recognition as person before law

242. The position is as reported in paragraph 301 of the initial report.

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

243. Some commentators have expressed the concern that proposals to enact legislation to give effect to article 23 of the Basic Law may compromise the rights and protections in article 17, as well as rights provided for in other articles of the Covenant. For cohesion of discussion, those concerns are addressed in paragraphs 381 to 396 below.

Personal data privacy

244. The position is essentially as explained in paragraphs 305 to 309 of the initial report. The Office of the Privacy Commissioner for Personal Data (PCO) now has 39 staff. Between July 1998 and June 2003, the PCO received 3,705 complaints and 90,700 inquiries relating to operational matters and compliance with the provisions of the Personal Data (Privacy) Ordinance (Chapter 486) (PDPO). In the same period, the PCO issued 339 warnings, 36 enforcement notices and referred eight suspected offences for investigation and prosecution by the Hong Kong Police Force.

245. Since July 1998, the PCO has issued three codes of practice that provide practical guidance for compliance with the PDPO.¹ It has continued to promote public awareness of and compliance with the Ordinance. Its success in that regard has been demonstrated by increasing community awareness of privacy issues as evidenced by the responses to public opinion surveys and consultation exercises on the subject.

Law Reform Commission's report on stalking

246. In October 2000, the Law Reform Commission's Privacy Sub-committee released a report on stalking. This recommended that a course of conduct causing alarm or distress to the victim should be made a criminal offence. It also suggested detailed provisions for inclusion in the proposed Bill: the recommendations are summarised at Annex 6, which formed Chapter 10 of the report. Comments ranged from support for the Commission's proposals to concerns that they might infringe the right to free expression (particularly press freedom) and, to a lesser extent, strong reservations about the need for legislation. We are considering the Commission's recommendations in the light of the public response.

Interception of Communications Ordinance

247. In paragraph 13 of its concluding observations of November 1999, the Committee expressed the concern that "the Interception of Communications Ordinance, which was passed in June 1997 in order to restrict the power of the authorities to intercept communications, has not

¹ Namely the: Code of Practice on Human Resource Management, voluntary Code of Practice on the Protection of Consumer Information for Fixed and Mobile Service Operators (jointly issued with the Consumer Council, the Independent Commission Against Corruption, and the Office of the Telecommunications Authority), and the revised Code of Practice on Consumer Credit Data.

yet been brought into effect. Section 33 of the Telecommunication Ordinance and Section 13 of the Post Office Ordinance still continue to be in force, thus allowing the authorities to violate the right to privacy under article 17 of the Covenant”.

248. We are conducting a review of the regulations governing the interception of communications. The review will take full account of comments received in response to the consultations on our ‘White Bill on the Interception of Communications’, which we published in February 1997 on the basis of recommendations put forward by the Law Reform Commission. The review remains in progress because of the need to take account of the rapid advances in the field of telecommunications and of the development of new interception legislation that other jurisdictions have introduced since the ‘9/11’ tragedy. Compliance with article 39 of the Basic Law - which entrenches the provisions of the Covenant (including article 17) at the constitutional level - continues to be a guiding principle.

249. Since the review clearly impinges on the issues that the Interception of Communications Ordinance (Chapter 532) was intended to address,² we have not appointed a commencement date for that Ordinance pending the review’s conclusion.

² See paragraph 317 of the initial report.

Article 18: Freedom of thought, conscience and religion

250. The legal and constitutional positions are as explained in paragraphs 321 and 322 of the initial report.

251. Some commentators have expressed the concern that proposals to enact legislation to give effect to article 23 of the Basic Law may compromise the rights and protections in article 18, as well as rights provided for in other articles of the Covenant. For coherence of discussion, those concerns are addressed in paragraphs 381 to 396 below.

Religious discrimination

252. The position is essentially as explained in paragraphs 323 to 325 of the initial report. Reports of this form of discrimination remain rare, though we have continued to receive occasional complaints about religious schools and NGOs rejecting applicants because they did not subscribe to the relevant faiths. As before, we have made every effort to contact the complainants and to establish the facts as perceived by them and by the organisations in question. But we have not been able to trace the parties.

253. Some commentators have asked us to explain our position in regard to the followers of the Falun Dafa, more commonly known as Falun Gong practitioners. Specifically, they have asked why the latter have been:

(a) **“Prohibited” from renting Government venues:** the fact is that we have not. The position is as explained in paragraphs 15.19 and 20 of our second report under the ICESCR in relation to article 15 of that Covenant;

(b) **Denied entry into Hong Kong:** it is well established in international law that a state has the right to control the entry of non-nationals into its territory subject to its treaty obligations. This principle has received judicial approval from the European Court of Human Rights.¹ Hong Kong’s obligations under the Covenant are subject to a reservation that it continues to apply immigration legislation as regards those persons who have no right to enter and remain. The BORO includes an express exception in equal terms² and our Court of Appeal has held that this prevents any persons without a right to enter or remain in Hong Kong from relying upon their rights under the Bill of Rights to challenge the lawful exercise of the powers of removal under the Immigration Ordinance.³

(c) **“Persecuted through political persecution” (sic):** the allegation is unfounded. It relates to the arrest, in March 2002, of practitioners who were charged with causing obstruction and assaulting the Police. In August 2002, they were variously fined for the offences on which they were convicted. The fines for each charge range from HK\$300 (about US\$38) to

¹ *Abdulaziz and others v The United Kingdom* (1985) 7 EHRR 471.

² In section 11 of Part III of the BORO.

³ *Hai Ho Tak v Attorney General* [1994] 2 HKLR202.

HK\$1,000 (about US\$128). The charges followed a series of daily demonstration that took place over several months and that, until March 2002, had caused minimal obstruction or inconvenience to the public. However, on 14 March 2002, the demonstrators - including those who were eventually prosecuted - moved their demonstration to the main entrance of the Liaison Office of the Central People's Government, intending to hold a three-day hunger strike there. The Police repeatedly warned them, over a four-hour period, that they were causing an obstruction (a position later accepted by the trial Magistrate) and that they should continue their action at their original position. Otherwise they would face arrest for obstruction. But the demonstrators ignored these requests and eventually were arrested. Pace our interlocutors, the case went through the due process of the law: the demonstrators were properly charged and received a fair trial. At the trial, they were represented by their own lawyers, had the opportunity to challenge the correctness of their convictions, as was their right, and they duly appealed.⁴

⁴ Although the closing date for this report was 30 June 2003, we think that the Committee will wish to know that the Court of Appeal heard their appeal in September 2003. At the time we were finalising the report, the Court's decision was pending.

Article 19: Freedom of opinion and expression

General

254. The constitutional and other legal protections are as explained in paragraphs 326 and 327 of the initial report. But some commentators have expressed the concern that proposals to enact legislation to give effect to article 23 of the Basic Law may compromise the rights and protections in article 19, as well as rights provided for in other articles of the Covenant. For coherence of discussion, those concerns are addressed in paragraphs 381 to 396 below.

Press Freedom and self-censorship

255. The position is essentially as explained in paragraphs 328 to 329 of the initial report.

Code on Access to Information

256. The Code continues to provide a workable framework for public access to Government information and the rate of compliance remains high. Between 1 March 1995 (when the Code was initiated on a pilot basis) and 30 June 2003, we received a total of 13,792 requests for information. Our performance under the Code was as follows:

Met in full	87.9%
Met in part	2.1%
Refused	1.8%
Documents requested not held by the departments concerned	3.4%
Withdrawn by requesters	4.1%
Others	0.7%
	100.0%

257. As explained in paragraph 331 of the initial report, applicants for information under the Code who are dissatisfied with the Government's response have access to The Ombudsman. Between March 1995 and 30 June 2003, The Ombudsman received 29 such complaints:

Complaints investigated	
Unsubstantiated	6
Partially substantiated	7
Substantiated	3
Complaints concluded by rendering assistance/clarification to complainants after examination of information provided by the departments concerned	8
Complaints discontinued/withdrawn by complainants	5
Total	29

Regulation and licensing of the broadcast media

258. There are provisions under the Broadcasting Ordinance (Chapter 562) and Telecommunications Ordinance (Chapter 106) restricting cross-media ownership of domestic free/pay television programme service licences and sound broadcasting licences respectively. The objectives of the restriction are to minimise editorial uniformity and media concentration. Essentially, any person or company who directly or indirectly holds or exercises control of an advertising agent or a newspaper is disqualified from holding a domestic free/pay television programme service licence or sound broadcasting licence. A domestic free/pay television programme service licensee or sound broadcasting licensee is also disqualified from holding another broadcasting licence. The Chief Executive in Council may approve exemptions on application by a disqualified person on public interest grounds.

Radio Television Hong Kong (RTHK)

259. The position is essentially as explained in paragraphs 344 and 345 of the initial report. The ‘Producer’s Guidelines’ foreshadowed in paragraph 345 are now operational.

Film classification system

260. The position is essentially as explained in paragraphs 347 and 348 of the initial report.

Appeals against the decision of the Film Censorship Authority and the censors

261. The position is essentially as explained in paragraph 349 of the initial report.

Regulation of obscene and indecent articles

262. The position is essentially as explained in paragraphs 350 to 354 of the initial report.

Content regulation on the Internet

263. In June 2003, the Government and the Hong Kong Internet Service Providers Association launched the Hong Kong ‘Internet Content Rating System’ (ICRS), which follows the system developed by the British Internet Content Rating Association (ICRA). Under this system, webmasters may declare their website content on a voluntary basis via an online questionnaire and obtain a content label from ICRA in return. Internet users can download a free label filtering software to allow or deny access to a particular website based on their own preferences. We have installed an “Internet Safety Hotline” to handle enquiries and complaints about offensive materials on the Internet. The hope is that the system will help to minimise the extent to which children and young people are exposed to such materials.

United Nations (Anti-Terrorism Measures) Ordinance (Chapter 575)

264. We enacted this law in July 2002. Its purpose is to implement some of the mandatory elements of United Nations Security Council Resolution 1373 and the most pressing

Special Recommendations of the Financial Task Force on Money Laundering for combating the financing of terrorism. In accordance with international practice, section 2(1) of the Ordinance provides that a ‘terrorist act’:

- “(a) Subject to paragraph (b) [below], means the use or threat of action where:
- (i) the action (including, in the case of a threat, the action if carried out):
 - (A) causes serious violence against a person;
 - (B) causes serious damage to property;
 - (C) endangers a person’s life, other than that of the person committing the action;
 - (D) creates a serious risk to the health or safety of the public or a section of the public;
 - (E) is intended seriously to interfere with or seriously to disrupt an electronic system; or
 - (F) is intended seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and
 - (ii) the use or threat is:
 - (A) intended to compel the Government or to intimidate the public or a section of the public; and
 - (B) made for the purpose of advancing a political, religious or ideological cause;

(b) *In the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action.*” [Editor’s emphases.]

265. Section 2(5) provides that nothing in the Ordinance shall:

- (a) Require the disclosure of any items subject to legal privilege;
- (b) Authorise the search or seizure of any items subject to legal privilege; or
- (c) Restrict the privilege against self-incrimination.

266. Safeguards for journalistic materials are provided in section 2(7)(b), which states that the provisions of the Ordinance shall be subject to the operation of Part XII (sections 81 to 90) of the Interpretations and General Clauses Ordinance (Chapter 1). The latter essentially provides that

any seizure of journalistic materials is subject to a warrant issued by a judge of the Court of First Instance or the District Court. The safeguards for items subject to legal privilege are provided in sections 2(5)(a) and (b).

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

267. The position is as explained in paragraphs 361 to 363 of the initial report.

Legislation on child pornography

268. The Legislative Council enacted the Prevention of Child Pornography Ordinance (Chapter 579) in July 2003. The Ordinance brings our laws into closer alignment with the Convention on the Rights of the Child, in particular with article 34 of that Convention. It protects children against sexual exploitation through child pornography, pornographic performances, and child sex tourism. The Ordinance also ensures our compliance with ILC No. 182 on the Elimination of the Worst Forms of Child Labour. Recognising the need for a balance between the protection of children against sexual exploitation and the freedom of expression, the Ordinance:

- (a) Carefully defines the term ‘child pornography’ so as to prohibit only the visual pornographic depiction of a person who is, or is depicted as being, a person under 16; and
- (b) Includes defence provisions recognising that:
 - (i) Certain works, because of their artistic merit, may warrant protection even though they may fall within the definition of ‘child pornography’; and
 - (ii) Certain activities in relation to ‘works’ falling within the definition of ‘child pornography’ should not be sanctioned if they are done for a genuine educational, scientific or medical purpose or otherwise serve the public good.

Article 20: Prohibition on propaganda for war

Propaganda for war

269. The position is as reported in paragraph 373 of the initial report.

Advocacy of national, racial, or religious hatred

270. The Television Ordinance (Chapter 52) - which, as explained in paragraph 374 of the initial report, empowered the Court of First Instance to prevent the broadcast of material likely to incite hatred - has been repealed and replaced by the Broadcasting Ordinance (Chapter 562). The new Ordinance came into full force in February 2001. The Broadcasting Ordinance provides a new regulatory regime for the provision of broadcasting services brought about by technological developments. In section 36, it prohibits:

“... a licensee from including in its licensed service a television programme, or any part thereof, that is likely, in Hong Kong, to incite hatred against any group of persons by reference to colour, race, sex, religion, nationality or ethnic or national origins; or result in a general breakdown in law and order; or gravely damage public health or morals.”

The mechanism for enforcing the prohibition rests with the Court of First Instance upon application by the Chief Secretary.

Article 21: Right of peaceful assembly

271. In its concluding observations of November 1999, the Committee commented that “with regard to freedom of assembly, the Committee is aware that there are very frequent public demonstrations in HKSAR and takes note of the delegation’s statement that permission to hold demonstrations is never denied. Nevertheless, the Committee is concerned that the Public Order Ordinance (Chapter 245) could be applied to restrict unduly enjoyment of the rights guaranteed in article 21 of the Covenant”. The Committee recommended that “the HKSAR should review this Ordinance and bring its terms into compliance with article 21 of the Covenant”.

272. 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 the Hong Kong Bill of Rights gives domestic effect to the provisions of article 21 of the Covenant. The provisions of the Public Order Ordinance in respect of the right to assembly were specifically framed with a view to conformity with article 21 of the Covenant. All decisions made under that Ordinance are subject to the Basic Law, article 39 of which enshrines the provisions of the Covenant as applied to Hong Kong.

273. As the Committee has rightly noted, demonstrations continue to be an integral part of daily life in Hong Kong. Between 1 July 1998 and 30 June 2003, there were some 11,461 public meetings and processions. The Police have only prohibited or objected to 21 such events on the grounds of public safety, public order and protection of the rights and freedoms of others. Nine of the events eventually took place after modifications of the route, venue or scale. If proof were needed that freedom of assembly is alive and well in the HKSAR, the large procession, of variously estimated at 350,000 to 500,000 people, on 1 July 2003 surely provides that. To emphasise the point, a survey conducted by the University of Hong Kong (also in July 2003) revealed a public rating of 7.49 marks out of a maximum 10 for the ‘freedom of procession and demonstration’: a record high.

The operation of the Public Order Ordinance

274. The position is as explained in paragraphs 376 to 381 of the initial report. Nonetheless, we take this opportunity to address the concerns that some commentators have expressed about the Ordinance. Essentially, those concerns are that:

- (a) The Police have used the Ordinance to institute the prosecution of peaceful demonstrators with ‘selective’ and ‘politically motivated’ arrests; and
- (b) Public demonstrations cannot proceed without a ‘notice of no objection’ issued by the Commissioner of Police.

275. The Police apply three levels of response to breaches of the Public Order Ordinance:

- (a) At peaceful events, where there are technical or unplanned breaches: a verbal warning will be given to the person in charge of the event. Details will be recorded and the event allowed to proceed;

(b) At peaceful events where the organiser has deliberately breached the law or disobeyed the lawful orders given by the Police: the Police will issue verbal warnings to the persons in charge, informing them that they consider possible prosecution action. Evidence of offences committed will be collected and presented to the Department of Justice, which will consider whether or not to prosecute; and

(c) At events where there are potential or actual breaches of the peace: the Police will verbally warn both the persons in charge and other participants, directing them immediately to cease any unlawful activity. If the warnings are ignored, the Police will, as appropriate, consider peaceful dispersal, physical removal of the crowd, or arrest. Evidence of any unlawful activity will be collected and legal advice will be sought after the event as to whether to initiate prosecution.

276. In arriving at its decision as to whether to prosecute, the Department of Justice always acts on the basis of the evidence of the case. There is no question of politically motivated prosecutions.

277. Between 1998 and 2002, there were 537 cases of organisers failing to notify the Police in accordance with the law. But the Police forwarded only 12 to the Department of Justice for advice as to whether prosecution was warranted. The remaining cases were not pursued because they involved unintended or technical breaches. On no occasion were political considerations a factor in the decision making process.

278. We explained the operation of the Public Order Ordinance in paragraphs 376 to 381 of the initial report, discussing the 'notice of no objection' in paragraph 378. Commentators' concerns and our views on them were explained in paragraphs 380 and 381. Those views are unchanged: essentially, the Police need advance notice of demonstrations so that, among other things, proper arrangements can be made to minimise any disruption to traffic and inconvenience caused to other members of the public. The HKSAR has an obligation to assist and provide for the right of peaceful public assembly and demonstration and cannot do so in Hong Kong's condition without prior notice of large peaceful processions and assemblies.

279. Thus, we consider the requirement to be a reasonable and proportionate response that balances the right of individuals to peaceful assembly with the interests and safety of the community as a whole. We believe that our commentators' misgivings are unfounded:

(a) Some commentators consider that the notice period prescribed in sections 8 and 13A (normally seven days) unnecessarily restricts the right of peaceful assembly. But the Ordinance provides the safeguard that, if the Commissioner of Police is reasonably satisfied that earlier notice could not have been given, he must accept such shorter notice and must give his

reasons if he does not so accept.¹ Thus, the ‘normal’ notification period of seven days must be, and is, applied with flexibility and reason. The seven-day period is partly required to allow the Appeal Board time to meet and consider appeals on any conditions imposed on a peaceful demonstration. See (d) below;

(b) The power of the Commissioner of Police to object to a procession is provided for in section 14. But this power is subject to section 14(3), which prescribes time limits within which he must notify the organisers of his decision. That is, if he objects to the procession, he must issue a notice of objection as soon as is reasonably practicable and within the specified time limit (48 hours before the commencement time of the procession if seven days’ notice is given). If he does not so object, he must issue a notice of no objection as soon as is reasonably practicable and within the same time limit. If he does not issue either a notice of no objection or a notice of objection within the time limit, he is taken to have issued a notice of no objection and the procession can proceed;

(c) There are further safeguards in sections 9 and 14, which provide that the Commissioner may only prohibit a public meeting or object to a public procession if he reasonably considers that the prohibition or objection is necessary in the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others. He cannot prohibit a public meeting or object to a public procession if he reasonably considers that the interests of national security or public safety, public order (*ordre public*) or the protection of the rights and freedoms of others could be met by imposing conditions;

(d) Under section 16, the Commissioner’s decisions are subject to appeal to the Appeal Board on Public Meetings and Processions. The Board comprises a retired judge and persons who are not public officers; and

(e) As a matter of Hong Kong constitutional law, if the powers in the Public Order Ordinance were exercised in ways inconsistent with article 21 of the Covenant as incorporated by article 17 of the Hong Kong Bill of Rights, the decision(s) in question would be unlawful and in breach of article 39 of the Basic Law. They could therefore be quashed by the courts.

280. In the last few months of 2000, there was extensive public discussion about the provisions of the Public Order Ordinance and whether they required amendment. Some

¹ The relevant provisions are sections 8(2) & (3) and 13A(2) & (3):

“(2) Notwithstanding subsection (1), the Commissioner of Police may, *and shall in any case where he is reasonably satisfied that earlier notice could not have been given,* accept shorter notice than is specified in that subsection. [*Editor’s emphases.*]

(3) In cases where the Commissioner of Police has decided not to accept shorter notice than is specified in subsection (1), he shall as soon as is reasonably practicable inform in writing the person purporting to give the notice of his decision and the reasons why the shorter notice is not acceptable.”

commentators considered that the freedom of peaceful assembly should not be subject to any form of regulation, and that the Public Order Ordinance should be reviewed. Others considered that the existing provisions struck a reasonable balance between the individual's rights to freedom of expression and peaceful assembly and the broader community interest in respect of public safety, public order, and so forth.

281. To ensure an open exchange of views, we proposed a full debate on the subject in the Legislative Council. Before the debate, the Council organised public hearings and received some 240 submissions. Most (78%) favoured retaining Ordinance in its existing form. After a nine-hour debate² the Council passed the motion that the legal provisions relating to the regulation of public meetings and processions should be preserved.

² On 20 and 21 December 2000.

Article 22: Freedom of association

282. Some commentators have expressed the concern that proposals to enact legislation to give effect to article 23 of the Basic Law may compromise the rights and protections in article 22, as well as rights provided for in other articles of the Covenant. For coherence of discussion, those concerns are addressed in paragraphs 381 to 396 below. (See current paragraph numbers.)

The operation of the Societies Ordinance

283. The position is as explained in paragraphs 385 to 389 of the initial report.

284. In paragraph 20 of its concluding observations of November 1999, the Committee expressed the concern that “with regard to freedom of association ... the Societies Ordinance may be applied in a way to restrict unduly the enjoyment of article 22 rights”. The Committee recommended that “the HKSAR should review this Ordinance so as to ensure full protection of the right to freedom of association, including trade union rights, under article 22 of the Covenant”.

285. We note the Committee’s concerns. But we do not accept that the Societies Ordinance could be applied in a way that might contravene the freedoms guaranteed in article 22. In paragraph 389 of our initial report, we indicated that there was a healthy growth in the number of societies, with 883 having either registered or been exempted from registration in the first 12 months after the reunification. That trend has continued at a brisk pace, with the post-reunification total reaching 8,105 by 30 June 2003. And it remains the case that the Police have not rejected any application for the formation of a society.

286. Some commentators have expressed the concern that the Societies Ordinance gives the Government power to ban specific organisations and ties between organisations and foreign political groups. This power is not unfettered. The decision to refuse to register can only be made by the Societies Officer, after consultation with the Secretary for Security, if he reasonably believes that:

(a) The refusal is necessary in the interests of national security, public safety, public order (*ordre public*), or the protection of the rights and freedoms of others; or

(b) If the society or the branch is a political body that has a connection with a foreign political organisation or a political organisation of Taiwan.

No decision to refuse an application shall be made without first giving the society an opportunity to be heard, or to make written representations, unless the Societies Officer reasonably believes that in the circumstances of the case it would not be practicable to do so. The Societies Officer’s decision is subject to appeal to the Chief Executive in Council. If the powers in the Societies Ordinance were applied in a way that contravened article 22 of the Covenant as incorporated by article 18 of the Hong Kong Bill of Rights, a decision to refuse an application would be unlawful and in breach of article 39 of the Basic Law, and could be quashed by the court.

Statutory protection against anti-union discrimination

287. The position is as explained in paragraph 8.4 of our second report under the ICESCR in relation to article 8 of that Covenant.

Regulation of trade union activities

288. The position is as explained in paragraphs 8.2 and 8.3 of our second report under the ICESCR in relation to article 8 of that Covenant.

Ban on members of the Police Force joining trade unions

289. The position is as explained in paragraph 399 of the initial report.

Organisations for the promotion of human rights

290. The position is as explained in paragraphs 401 to 404 of the initial report. Annex 7 updates Annex 17 of the initial report (referred to in paragraph 402 thereof).

Article 23: The family - a vital component of society

291. The position is as explained in paragraphs 405 to 407 of our initial report. The processes contributing to the demise of the traditional extended family - and the trend towards small, nuclear families - continue. Single parents, unmarried couples, divorces¹ 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

292. These are essentially as explained in paragraph 408 of the initial report though - as foreshadowed there - at an expanded level. As at March 2003, there were 744 caseworkers in 66 family service centres/integrated family service centres. In 2002-03, they handled over 90,000 cases. These services are discussed more extensively in paragraphs 10.31 to 10.36 in our second report under the ICESCR, in relation to article 10 of that Covenant.

Children affected by family disputes

293. The position is as explained in paragraph 409 of the initial report, though the Social Welfare Department now provides its counselling and other services relating to divorce, separation, and child custody through five Family and Child Protective Services Units. The Units were restructured in 2002 with the amalgamation of the Child Custody Services Unit (referred to in the initial report) and the Department's Child Protective Services Units.

294. There is extensive discussion of this and related issues in paragraphs 53 to 104 of our second report under the CEDAW in relation to article 5 of that Convention. Also relevant are paragraphs 14 to 231, in sections V(I), (J), and (K) of our initial report under the CRC (in relation to articles, 19, 39, and 25 of that Convention) and paragraphs 10.42 to 10.45 of our second report under the ICESCR in relation to article 10 of that Covenant.

295. In January and April 2002 respectively, in the light of the review foreshadowed in paragraph 411 of the initial report, the Law Reform Commission released reports recommending that the Government simplify the guardianship of children and strengthen the existing legal protections against parental child abduction. We are now studying the reports but will defer any decision until we have also considered further recommendations on guardianship and custody that the Commission expects to release in early 2004.

Split families

296. We explained the background to this issue - and the measures we were taking to address the related problems - in paragraphs 417 to 425 of the initial report. Developments since then are discussed in paragraphs 168 to 180, in section V(D) of our initial report under the CRC in relation to article 10 of that Convention and in paragraphs 10.5 to 10.13 of our second report under the ICESCR in relation to article 10 of that Covenant.

¹ The number of divorce petitions rose from 14,482 in 1997 to 16,839 in 2002.

Post-divorce protection of spouses and children: improvements to the Attachment of Income Order Scheme

297. The Attachment of Income Order Scheme came into operation in April 1998, following the enactment, in June 1997, of the Marriage and Children (Miscellaneous Amendments) Ordinance. Such orders, which emanate from the courts, require the deduction at source of the amounts that maintenance payers have been ordered to pay their spouses and the direct payment thereof to the payees. In 2001, to address the difficulties that maintenance payees encountered in collecting and enforcing such payments, we introduced further amendments to relax the circumstances in which Attachment of Income Orders could be made. Among other things, those changes empowered the courts to dispense with or relax any procedure or to abridge any time limit specified in the rules under certain circumstances.

Amendments to the Matrimonial Causes Rules

298. The Matrimonial Causes (Amendment) Rules of December 2001 simplify the procedures for handling undefended petitions or joint applications for divorce or judicial separation. The Rules also allow the Court to focus on the substantive issue of the welfare of children in the case by holding private hearings in which the issues can be discussed in an informal and relaxed atmosphere.

Interest and Surcharge on Arrears of Maintenance Ordinance 2003²

299. This Ordinance was enacted in May 2003. It entitles maintenance payees to automatic interest on the amount of maintenance in default. They may also apply to the courts for a surcharge on the maintenance arrears where they consider that the maintenance payer has repeatedly defaulted on payment without reasonable excuse. The surcharge ceiling is 100% of the arrears. We are currently designing a computer programme to facilitate the calculation of the amounts due and will appoint a commencement date for the Ordinance when the programme is ready.

New arrivals from Mainland China

300. In paragraphs 417 to 425 of the initial report, we explained the position of new arrivals from Mainland China and the initiatives then being taken to ease the process of their settlement. Those initiatives have continued and, where necessary, improved and/or updated. But we have also introduced new initiatives, including:

(a) **Identifying needs:** in late 2002/early 2003, the Home Affairs Department conducted a study to assess new arrivals' needs. The findings - which we expect to publish in late 2003 - will enable us to assess the effectiveness of the services we currently provide for them;

² The Ordinance has not been assigned a Chapter number in the Laws of Hong Kong because it is a piece of legislative amendment to be incorporated into existing ordinances.

(b) **Education:** the position is as explained in paragraphs 353 to 356 of our initial report under the Convention on the Rights of the Child, in relation to article 28 of that Convention and in paragraphs 13.59 to 13.60 of our second report under the ICESCR, in relation to article 13 of that Covenant;

(c) **Housing:** in planning its forward building programme, the Housing Authority has taken account of new arrival-generated demand. With the relaxation of the former seven-year residency rule, which we explained in paragraph 382 of our initial report in the light of the ICESCR, in relation to article 11 of that Covenant,³ new arrivals can secure public rental housing much sooner than was previously possible. They are regularly offered temporary residence in interim housing⁴ pending allocation to permanent public housing. Once in public housing, they enjoy the same housing benefits as do local residents. Among others, those benefits include rent assistance for tenants in financial hardship and transfers to larger flats, either on medical or social grounds, or because of overcrowding in their existing accommodation;

(d) **Welfare:** the initiatives we are taking in this area are explained in paragraphs 10.29 to 10.30 of our second report under the ICESCR, in relation to article 10 of that Covenant; and

(e) **Community education:** in 2001, we initiated a major annual Community Education Programme to promote mutual understanding between local residents and new arrivals.

This issue is also discussed in paragraph 10.30 of our second report under the ICESCR, in relation to article 10 of that Covenant.

Report of the Task Force on Population Policy: impact on needy families

301. Currently, persons seeking support under the CSSA or the SSA must have resided in Hong Kong for at least one year. But in 2002, the Chief Secretary for Administration convened a high level task force to identify the main social and economic challenges to Hong Kong arising from the changing population profile over the next 30 years and to recommend practical

³ Formerly, the policy was that - to be eligible for public rental housing - applicants and the majority of their family members had to have resided in Hong Kong for seven years. This, the so called 'majority rule' was relaxed in 1999, so that only half the members of an applicant's household were required to have resided in Hong Kong for seven years. And children born outside Hong Kong would be treated as having met the residence qualification, provided that at least one parent met the seven-year residence requirement. In 2001, the rule was further relaxed so that, now, applicants on the Waiting List need not fulfil the seven-year residence rule if half their family members meet the criterion.

⁴ See paragraph 363 of our initial report in the light of the ICESCR, in relation to article 11 of that Covenant.

measures to address them. The Task Force published its findings in early 2003, recommending, inter alia, that we extend the eligibility period for the CSSA to seven years. We have accepted that recommendation and it will take effect from 1 January 2004. Commentators have asked how we will support families who will be ineligible for such support when the new rule comes into effect.

302. We attach particular importance to facilitating the early and complete integration of newly arrived children and young people into our community. With that in view, we have exempted children under the age of 18 from any prior residence requirement. In exceptional circumstances, the Director of Social Welfare will, as now, consider exercising discretionary power to grant CSSA to adult applicants who do not satisfy the residence requirements. And, like other Hong Kong residents, new arrivals and their children have access to a wide range of welfare services provided by the Government and by NGOs. For these reasons, the new policy will not significantly affect the welfare of families in need, regardless of their length of residence. Indeed, for the reasons above, it will actually ameliorate the position of children aged under 18.

Article 24: Rights of children

Age of criminal responsibility

303. In paragraph 17 of its concluding observations of November 1999, the Committee expressed the concern that “that the age of criminal responsibility is seven years and takes note of the statement by the Delegation that the Law Reform Commission is currently conducting a review of this matter”. The Committee recommended that “the age of criminal responsibility should be raised so as to ensure the rights of children under article 24”.

304. The Law Reform Commission published its final report on the “Age of Criminal Responsibility in Hong Kong” in May 2000, recommending that the minimum age of criminal responsibility be raised from seven to ten. Accordingly, in November 2001, we introduced the Juvenile Offenders (Amendment) Bill 2001¹ into the Legislative Council to give the recommendation effect in law. The Amendment Bill was enacted in March 2003 and came into operation on 1 July 2003.

Right to acquire a nationality

305. The general position remains essentially the same as discussed in paragraph 427 of the initial report. However, we take this opportunity to inform the Committee of a case heard in January 2002, by the Court of Appeal. The case concerned article 5 of the Nationality Law of the People’s Republic of China (NLPRC),² which provides that:

“Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality but a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.”

306. The case concerned a child who was born in Germany. The parents were Chinese nationals. The issue to be resolved was whether the child who had subsequently acquired German nationality by naturalisation was a Chinese national for the purpose of obtaining or holding a HKSAR passport. The Court held that, as both parents were Chinese nationals and the child did not have any foreign nationality at birth, he was a Chinese national within the terms of article 5 of the NLPRC.³

¹ Chapter 226 amending legislation.

² *Tse Yiu Hon Patrick (an infant) v. HKSAR Passports Appeal Board* [2002] 3 HKC 501.

³ In accordance with 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 of 15 May 1996, Chinese nationals holding foreign passports will not automatically lose their Chinese nationality. A Chinese national shall lose his Chinese nationality only upon application to the Immigration Department for changing his nationality.

Convention on the Rights of the Child

307. The initial report of the Hong Kong SAR was submitted in June 2003, as part of China's second report under that Convention.

Day care services

308. The position is essentially as explained in paragraphs 430 and 431 of the initial report and in paragraph 147 of our initial report under the Convention on the Rights of the Child, in relation to article 18 of that Convention. But demand for the services described in those reports has decreased as Hong Kong's child population has steadily shrunk⁴ and we have introduced measures to rationalise the provision of those services. Inter alia, those measures have included converting day crèches into day nurseries (where demand so justifies) or day nursery-cum-crèche centres, reprovisioning under-enrolled centres to newly developed areas, reducing capacity, and closures. In taking these measures forward, our guiding principles have been access to services and convenience to parents.

Residential child care services

309. The position remains essentially as explained in paragraph 151 of our initial report under the Convention on the Rights of the Child, in relation to article 18 of that Convention. In the financial year 2002-03, we increased the number of foster care places to a total of 670, and will further provide an additional 75 such places in 2003-04, making a total provision of 745 places. As at 30 June 2003, a total of 1,535 children were in non-institutional residential care.

Child care assistance for parents

310. Commentators have proposed that we should introduce legal measures to penalise parents for leaving their children at home without supervision. We recognise the need for children to be properly cared for. But - having carefully examined the issues - have concluded that specific legislation would be difficult to police and to enforce, and would therefore be ineffective. That said, the act of leaving a child unattended is a form of neglect and is addressed under the Offence Against the Persons Ordinance (Chapter 212)⁵ and the Protection of Children and Juveniles Ordinance (Chapter 213).⁶ Additionally, we provide assistance to parents who cannot supervise their children on a constant basis. These include the services described in paragraph 147 of our initial report under the Convention on the Rights of the Child. Additionally, the 26⁷ mutual help

⁴ The 2001 Population Census revealed a significant reduction in the 0 to 6 age group: from 410,000 in 1996 to 350,000 in 2001.

⁵ In sections 26 and 27.

⁶ In section 34(2).

⁷ As at March 2003: 12 more are to follow.

child care centres provide a flexible form of child care service for children under the age of six. They are run by the Social Welfare Department, social welfare agencies, and various other bodies on a self-financing, non-profit-making basis.

Child abuse

311. The position remains essentially as explained in paragraphs 214 to 231 (section V(I)) of our initial report under the CRC, in relation to article 19 of that Convention.

Child abuse as crime

312. The position is as explained in paragraph 10.47 of our second report under the ICESCR, in relation to article 10 of that Covenant.

The Child Care Services Ordinance

313. The position remains essentially as explained in paragraph 148 of section V(B) of our initial report under the CRC, in relation to articles 18(1) and (2) of that Convention.

Protection of children born out of wedlock

314. The position remains as explained in paragraph 443 of the initial report.

Youth welfare

315. The position remains essentially as explained in paragraph 10.19 of our second report under the ICESCR in relation to article 10 of that Covenant.

Review of the Adoption Ordinance

316. The review foreshadowed in paragraph 446 of the initial report is complete. In June 2003, on the basis of its findings, we introduced legislative amendments into the Legislative Council. With the interest of the child being the prime concern, the proposals seek to improve local adoption arrangements and to give effect to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. The major proposals are at Annex 8. A Bills Committee of the Legislative Council will scrutinise the Bill.

Other child-related statutes

317. Commentators have called for a review of the Offences Against the Persons Ordinance (Chapter 212) with a view to aligning its provisions with those of the Protection of Children and Juveniles Ordinance (Chapter 213). Their concern is that, when a child is placed under a care or protection order under section 34 of the Protection of Children and Juveniles Ordinance, the parents are not subjected to supervision. This, they say, provides inadequate assurance of children's safety and welfare.

318. The position is that Chapter 213 is primarily concerned with the care and protection of children and juveniles. It is part of the civil law and its primary concern is the needs of children, not the punishment of parents or guardians, though - in section 34(1)(d)) - it does provide for parents and guardians to enter into recognisance to exercise proper care and guardianship. By contrast, the Offences Against the Persons Ordinance is part of the criminal law that views the ill-treatment or neglect children or juveniles by those in charge of them as a crime. Parents or guardians are liable to prosecution and, on conviction on indictment, are liable to ten years' imprisonment, or to three years on summary conviction.⁸ Thus, the two statutes complement one another, ensuring the welfare of children from the different perspectives of the civil and criminal law. We do not, therefore, envisage a need to review or amend them as our commentators have proposed.

Legal representation

319. The position is essentially as explained in paragraphs 430 and 431 (section VIII(D)) of our initial report under the Convention on the Rights of the Child, in relation to articles 37(b), (c), and (d) of that Convention. However, in 2003, we introduced a new scheme whereby children or juveniles who are deprived of their liberty and detained in a place of refuge under the Protection of Children and Juveniles Ordinance, receive legal assistance as of right.⁹

Children in armed conflict

320. The position remains as explained in paragraph 405 of our initial report under the Convention on the Rights of the Child, in relation to article 38 of that Convention.

The Child Ambassadors' Scheme

321. The year 2000 marked the tenth anniversary of the entry into effect of the Convention on the Rights of the Child. We marked the occasion in several ways, the key initiative being the 'Child Ambassadors' Scheme'. As we advised the Committee on the Rights of the Child in paragraph 12 of our initial report under that Convention,¹⁰ the purpose was to draw attention to the Convention by capturing the public's imagination and interest. It was jointly organised by Against Child Abuse, the Hong Kong Committee on Children's Rights and the Hong Kong Committee for UNICEF, Hong Kong's leading activists for children's rights. Funding was jointly provided by Cathay Pacific Airways and the Government, so harnessing the talents and resources of the charitable, commercial, and public sectors. Twenty 'ambassadors' were selected

⁸ Section 27.

⁹ This was in accordance with article 37(d) of the Convention on the Rights of the Child. The article provides that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

¹⁰ In relation to article 42 of the Convention.

in open competition. In January 2001, ten went to Geneva where they met members of the Committee on the Rights of the Child, to whom we are most grateful. In February 2002, the remaining ten undertook a mission to Thailand where they exchanged ideas and experience with Thai NGOs for children's rights. But the ambassadors' main task is actively to promote public awareness of the Convention - and of the rights that it secures for their fellow children - in Hong Kong itself.

322. In March 2003, we provided funding to enable our NGO partners in the Child Ambassadors' Scheme to organise Hong Kong's first Children's Council. The objectives were to promote public awareness of the Convention on the Rights of the Child and to give practical effect to the right of children to respect for their views. Among the 60 Child Councillors who participated, ten were Child Ambassadors. The Councillors debated five motions that they themselves had initiated and that they discussed with seriousness, maturity, and intelligence. Legislators and senior representatives of the Government appeared before them, to answer questions and to participate in the discussion. The event aroused public awareness of the Convention in particular and of children's rights in general.

323. The Hong Kong Children's Council of 2003 marked a major step towards alignment with the best international practices.¹¹ Our hope is that Hong Kong's first Child Councillors will share what they have learned with their peers and spread the message as widely as possible, stimulating public interest in children's rights and providing the participants with practical insights into child rights in action.

¹¹ Children's Parliaments are increasingly common internationally and have been established in several countries such as the United Kingdom, France, and Switzerland.

Article 25: Right to participate in public life

324. 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.

Election of the Chief Executive

325. Under the Basic Law, the Chief Executive is selected by election or through consultations held locally, and appointed by the Central People's Government. As explained in paragraph 59 above in relation to article 1, Annex I to the Basic Law prescribes the specific method for selecting the Chief Executive. It provides, inter alia, that the Chief Executive shall be elected by a broadly representative Election Committee through secret ballot on a one-person-one-vote basis. In July 2001, this provision took effect in domestic legislation with the enactment of the Chief Executive Election Ordinance (Chapter 569).

326. The 800-member Election Committee comprises permanent residents of the HKSAR who are broadly representative of the different sectors in the community.¹ Most were returned by election in July 2000, under the supervision of the Electoral Affairs Commission. Exceptions were the representatives of the religious sub-sector (who were returned by nomination) and the ex-officio members of the Election Committee. The latter comprised members of the Legislative Council (who were themselves elected), and the Hong Kong deputies to the National People's Congress.

327. At the close of nominations for the second term Chief Executive, only one candidate, Mr Tung Chee-hwa, was validly nominated. Accordingly, he was declared elected in February 2002, in accordance with the Chief Executive Election Ordinance. In March 2002, the Central People's Government formally announced Mr Tung's appointment as the second term Chief Executive.

Executive Council

328. As explained in Part I of this report (paragraphs 12 and 13), 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 to 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.

¹ The size, composition, and functions of the Election Committee are prescribed in Annex I to the Basic Law.

The 2000 Legislative Council elections

329. The second term Legislative Council comprises 60 members returned by elections on 10 September 2000. The elections were conducted under the supervision of the Electoral Affairs Commission and in accordance with the relevant provisions of the Basic Law, the relevant domestic statutes, and their subsidiary legislation.² The powers and functions of the Legislative Council are explained in Part I of this report, at paragraph 17.

330. As provided for in Annex II to the Basic Law, candidates of the HKSAR's second term Legislative Council were returned as follows:

(a) **Geographical constituencies:** 24 members were returned by direct elections based on universal suffrage, through the list voting system, which is a form of proportional representation system. All permanent residents of the HKSAR who had reached the age of 18 or above were eligible to be registered and to vote. Some 3.1 million people - 68 per cent of those eligible to do so - registered as electors. Over 1.33 million registered electors voted: a turnout of 43.6 per cent;

(b) **Functional constituencies:** returned 30 members. As explained in paragraphs 459(b) and 461 of the initial report, where we also responded to commentators, these constituencies represent economic, social, and professional sectors that are substantial and important to Hong Kong; and

(c) **The Election Committee (see paragraph 326 above):** returned six members.

The electoral system

331. In paragraph 12 of the 1999 concluding observations, the Committee reiterated its "concern, expressed in paragraph 19 of its concluding observations, adopted at the end of the consideration of the fourth periodic report, that the electoral system for the Legislative Council does not comply with articles 2, paragraphs 1, 25 and 26 of the Covenant. The Committee is concerned about the impending abolition of the Municipal Councils that would further diminish the opportunity of HKSAR residents to take part in the conduct of public affairs, that is guaranteed under article 25. The HKSAR should reconsider this step. It should take all necessary measures to maintain and strengthen democratic representation of HKSAR residents in public affairs". Local commentators have echoed those concerns. We address them seriatim in the paragraphs that follow.

332. We note the Committee's concerns. But we respectfully maintain the position - explained in paragraph 461 of the initial report - that they overlook the reservation entered in respect of

² Namely the Legislative Council Ordinance (Chapter 542), the Electoral Affairs Commission Ordinance (Chapter 541), and the Elections (Corrupt and Illegal Conduct) Ordinance (Chapter 554).

article 25 when the Covenant was extended to Hong Kong. We remain of the view 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.

333. Commentators have also called for constitutional reforms to achieve progress in democratic development. As explained in paragraph 61 above in relation to article 1, the Basic Law provides that the number of directly elected seats in the Legislative Council will increase from one-third in the first term (1998-2000), to 40 per cent in the second term (2000-2004), and to 50 per cent in the third term (2004-2008). The second term Legislative Council was formed in 2000 in accordance with the provisions of the Basic Law. The Legislative Council (Amendment) Ordinance 2003, which provides the legal basis for the third term Legislative Council elections, also complies with the Basic Law. It provides for 30 seats to be returned by geographical constituencies through universal suffrage, and a further 30 seats to be returned by functional constituencies. The method for selecting the Chief Executive also complies with the Basic Law.

334. Commentators have expressed the concern that the Interpretation and the Decision of the NPCSC adopted in April 2004 has eroded the "One Country Two Systems" principle and the provision in article 2 of the Basic Law regarding the exercise of a high degree of autonomy. But, as article 2 of the Basic Law makes clear, Hong Kong's high degree of autonomy is exercised under authorisation by the Central Authorities, and must be understood in the context of the Constitution of the People's Republic of China and the Basic Law. Insofar as constitutional development is concerned, both documents clearly prescribe the powers and responsibilities of the Central Authorities. The NPCSC has been acting within these constitutional prerogatives.

335. Commentators have also expressed concern that, as a result of the Decision of the NPCSC adopted on 26 April, there would not be universal suffrage in 2007/08. Universal suffrage is the ultimate aim provided for in the Basic Law and there is broad support in the community for that aim. But there are different views in the community on the pace for attaining it. Whilst some would like to see universal suffrage in 2007/08, others prefer a more measured approach. Having considered all views expressed by the Hong Kong community on this issue, as well as the provisions of articles 45 and 68 of the Basic Law in respect of the principle of gradual and orderly progress and the actual situation in Hong Kong, the NPCSC has considered that constitutional development in a prudent and step-by-step manner is the appropriate way forward. The NPCSC's decision still leaves Hong Kong with plenty of scope for change to the election methods in 2007/08 to make the system more representative.

Nationality requirements for Legislative Council candidates

336. This is addressed in paragraphs 377 to 379 below in relation to article 27.

Review of district organisation and the abolition of the Provisional Municipal Councils

337. We note the Committee's concerns in regard to the abolition of the Provisional Municipal Councils (paragraph 12 of the concluding observations and paragraph 331 above). But, again, we must respectfully dissent from the view that there was ever any risk that the abolition would

“further diminish the opportunity of HKSAR residents to take part in the conduct of public affairs, that is guaranteed under article 25”. For the reasons below, we consider that the changes were timely, in the public interest, and in accord with consensus of public opinion.

338. In the course of the review and consultations foreshadowed in paragraphs 472 and 473 of the initial report, respondents expressed concern about the fragmentation of responsibility for the delivery of municipal services and questioned the need for two tiers of district organisation. There was a broad consensus within the community that there was a need to reform the framework for the delivery of municipal services so as to improve co-ordination in the formulation and implementation of policy and to improve cost-effectiveness in service delivery.

339. In response, we have introduced a new regime for the delivery of municipal services, whereby the Government has:

- (a) Assumed direct responsibility for all functions relating to food safety and environmental hygiene. This addressed the problem of fragmentation of responsibility; and
- (b) Established a new structure to provide policy direction and services in the areas of arts, culture, sports, and recreation.

These changes were made in parallel with the dissolution of the two Provisional Municipal Councils, which is discussed in Part I of this report (paragraphs 21 and 22).

340. After the reorganisation, elected institutions continue to participate in matters relating to the provision of municipal services. Specifically:

- (a) The Legislative Council scrutinises the budget, policy programmes and initiatives of the various government agencies providing municipal services. The Council is also responsible for approving the majority of capital works projects and fees and charges for municipal services and facilities;
- (b) At the district level, the District Councils have a wider role and more substantial resources than did the District Boards that preceded them;
- (c) The District Councils monitor the delivery of environmental hygiene and leisure and cultural services in the districts. And they have been given additional funds for the improvement of the local environment and for commissioning district leisure and cultural activities. These are functions formerly undertaken on a regional basis by the Provisional Municipal Councils;
- (d) The chairpersons and vice chairpersons of the District Councils are members of their respective District Management Committees, and so participate in the co-ordination of government services and the setting of priorities in the districts; and
- (e) The number of elected District Council members has increased progressively since the Councils' first term in 1999. Then, the Councils had in total 44 more elected members than the District Boards had in 1997. In the second term elections, which will take place in November 2003, that difference will increase to 54.

341. Thus, abolishing the Provisional Municipal Councils has not undermined public participation. Nor has it undermined public representation at the local level. But we will monitor the system to ensure that it remains responsive to the changing needs of the community. As undertaken by the Chief Executive in his Policy Address in January 2004, we will review the function and composition of the District Councils at a suitable time.

Electoral Affairs Commission

342. We explained the Commission's composition, role, and functions in paragraph 463 of the initial report. In paragraph 464 thereof, we explained the measures taken to ensure the transparency of the electoral process. Those measures were applied in the 2000 election.

The 1999 and 2003 District Council elections

343. The first District Council election was held on 28 November 1999, with a total turnout rate of 35.8%. The 18 District Councils came into being on 1 January 2000 by virtue of the District Councils Ordinance (Chapter 547). The HKSAR is divided into 390 constituencies, each returning one elected member. There are a maximum of 102 appointed members, and 27 ex-officio members. The work and functions of the District Councils are explained in Part I of this report (paragraphs 18 and 19). The second District Council election will be held in November 2003, with candidates standing in 400 constituencies, each returning one elected member. The second term will begin on 1 January 2004.

The Accountability System

344. The Accountability System, which, among other things, put into place a new system for appointing Secretaries of Departments and Directors of Bureaux, was introduced on 1 July 2002. It has brought about a new system of governance and introduced fundamental change to Hong Kong's system of public administration.

345. Previously, bureau chiefs were career civil servants. Under the new system, they are political appointees. There is now a politically appointed team of Principal Officials led by the Chief Executive to account to the people of Hong Kong for the governance of Hong Kong. The term of office of these Principal Officials cannot extend beyond the expiry of the term of office of the Chief Executive who nominated them for appointment. The public can now clearly identify the political team and individual Principal Officials who are responsible for specific policy portfolios and hold them accountable for the success or failure of policies and policy outcome. Collectively, they have to address public demands and face public pressure. They have to ensure that their policies meet public expectations and are in the long term interests of Hong Kong.

346. The Accountability System has brought about a number of significant changes. Specifically:

(a) It has widened the pool of candidates for appointment as Principal Officials. Henceforth, any future Chief Executive will have to form his or her own team of Principal Officials who are prepared to share political responsibility and to serve the people of Hong Kong under his or her leadership. The pool of candidates is not restricted to civil servants.

Committed, capable and competent persons, within and outside the civil service, can join the top echelon of Government. Candidates with political party backgrounds can be considered. Having a wider pool of candidates is beneficial to the better governance of Hong Kong and has the potential to enhance public participation in the administration of Hong Kong affairs;

(b) With the clear separation of the politically appointed Principal Officials and the civil service, members of the latter can now focus on their role as civil servants. They are no longer expected to bear the brunt of political pressure as they did prior to 1 July 2002. The appointment of the new civil service rank of Permanent Secretary has institutionalised and strengthened Hong Kong's tradition of a professional, meritocratic, honest, and politically neutral civil service; and

(c) The Accountability System requires Principal Officials to shoulder political responsibility. Under the previous system, Principal Official positions were filled by civil servants and any misconduct had to be handled in accordance with the civil service disciplinary mechanism. And civil servants were not in a position to shoulder political responsibility. Thus, the present system represents a major step forward in the system of governance.

347. Commentators have said that it would have been more appropriate to introduce the Accountability System after the election of the Chief Executive by universal suffrage. We disagree. Although we have not yet attained universal suffrage, Hong Kong's institutions are highly open and transparent. We have an elected legislature and a free press. The design of the Accountability System is to subject the Principal Officials to the scrutiny of the Legislative Council, the media and the public. The Basic Law also provides for a mechanism of checks and balances between the executive and legislative authorities. And we need the support and co-operation of the Legislative Council before any major financial or legislative proposals can be implemented.

Looking ahead

348. We reviewed the implementation of the Accountability System one year after its introduction. A report on the findings of that review was put to and considered by the Legislative Council Panel on Constitutional Affairs in July 2003. The report concluded that, in overall terms, the Accountability System represented an important step in the right direction. However, we clearly recognise that the first year of operation was not entirely smooth and that there was scope for improvements. With that in mind, we will improve on the existing arrangements of canvassing public opinions and communicating with the public, with a view to strengthening our links with different sectors of the community and ensuring that our policies are more attuned to public aspirations.

Government Advisory Boards and Committees

349. In paragraphs 74 to 75 and paragraphs 474 to 476 of the initial report, we explained that the advisory and statutory bodies were a distinctive feature of Hong Kong's system of

government: that remains the case. The Government relies on them to provide advice on its policies, to resolve disputes between the Government and aggrieved parties, and to deliver public services. There are at present about 500 of these bodies, about 44% of which are statutory. Some 5,000 members of the public are serving on them.

350. With the inception of the accountability system, we undertook to review the role and functions of the boards and committees, issuing a public consultation paper to that purpose in April 2003. In the paper, we proposed, inter alia, that:

- (a) Appointments should continue to be based on merit;
- (b) Men and women who were suitable for appointment should have an equal chance of being appointed. By way of an initial benchmark, we proposed that the membership of any advisory board or committee should normally comprise at least 25% of either gender;
- (c) In making appointments, care should be taken not to discriminate on the grounds of gender, age, race, disability, religion, family status, sexual orientation or social background; and
- (d) The work of the advisory and statutory bodies should be open and transparent. Their agenda and papers should be made available on request, unless they were classified. More use should be made of the Internet to publicise their work.

351. The review is being conducted in two stages:

- (a) The first stage was in progress as we were finalising this report. In this stage of the exercise we have examined the existing system with a view to identifying issues and problems and formulating the guiding principles for the more detailed second stage review; and
- (b) In the second stage, individual bureaux and departments will examine the work of the advisory and statutory bodies under their purview on the basis of the guiding principles in (a) above.

The findings of the review (both stages) will be published and reported to the Legislative Council in due course.

Rural elections

352. In paragraphs 71 to 73 of the initial report, we explained that there were three levels of election in the villages of the New Territories, the first level being the election of village representatives. 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.

353. Both sexes have the right to vote and to stand for election. That right is guaranteed under articles 1 and 21 of the Hong Kong Bill of Rights and articles 25, 26 and 39 of the Basic Law.³ Additionally, as explained in paragraph 72 of the initial report, the 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.

354. In December 2000, the Court of Final Appeal ruled that, in deciding whether to approve an elected village representative, the Government had to consider whether the person elected to represent a village was elected in accordance with electoral arrangements consistent with the BORO and the SDO. Consequent to that ruling, and recognising the need to reform the village election system, we decided that the conduct of those elections should be brought under statutory control. Accordingly, in February 2003, the Legislative Council enacted the Village Representative Election Ordinance (Chapter 576), which provides for electoral arrangements that are open, fair, honest, and consistent with the BORO and the SDO.

355. The main features of the new arrangements are:

- (a) All village representatives are elected;
- (b) The arrangements apply to both indigenous and non-indigenous villages;
- (c) In future, the tenure of office of village representatives will be four years. But, in the first term - which is a transitional period - tenure will run from 1 October 2003 to 31 March 2007; and

³ Articles 1 and 21 of the Hong Kong Bill of Rights provide respectively for the equal enjoyment of all rights recognised in the Hong Kong Bill of Rights 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 ICCPR and the ICESCR as applied to Hong Kong shall remain in force.

- (d) There will be two types of village representative:
- (i) ‘indigenous inhabitant’⁴ representatives: as the title indicates, these represent the indigenous inhabitants of their villages. Their function is to reflect their constituents’ views on village affairs and to deal with all matters relating to the lawful and traditional rights and interests, and the traditional way of life. They are returned by the indigenous inhabitants of their village and their spouses. Their electorate may live in the village, in other parts of Hong Kong, or abroad; and
 - (ii) ‘resident representatives’: reflect the views of their constituents on the affairs of an ‘existing village’⁵ on behalf of the residents of that village. Each existing village will have one resident representative. The representative shall not deal with any affairs relating to the lawful traditional rights and interests of indigenous inhabitants. ‘Resident representatives’ are returned by residents (both indigenous and non-indigenous) of an ‘existing village’ that is listed as such in column 2, Schedule 1 to the Village Representative Election Ordinance (see footnote 5).

A person may stand as a candidate in one village only, irrespective of whether it is an existing village or an indigenous village. The Electoral Registration Officer is responsible for compiling a register of electors for each respective village.

Eligibility to vote in village elections

356. The eligibility criteria are at Annex 9.

The 2003 rural election

357. In the 2003 rural election, about 80,000 electors registered to vote in existing villages and 78,000 in indigenous ones. There were 1,640 validly nominated candidates

⁴ Under section 2 of the Village Representative Election Ordinance (Chapter 576), an “indigenous inhabitant”, in relation to an indigenous village that existed in 1898 (whether or not the name the village now has is the same name it had in 1898), means:

- (i) a person who was in 1898 a resident of the village; or
- (ii) a person who is descended through the male line from a person mentioned in subparagraph (i).

⁵ Section 2 of the Village Representative Election Ordinance defines an “existing village” in terms that require reference to Schedule 1 of the statute, which designates such villages by name and the reference number of the map on which the area of each such village is delineated. Essentially, however, an existing village is one that is *physically* present in a location specified in the schedule. Its inhabitants may be indigenous, non-indigenous, or a combination of both.

for election, 930 being returned without contest. The remaining 710 competed for a total of 361 seats in elections held in July/August 2003. There were 189 seats for which no nominations were received.

Women in rural elections

358. In paragraphs 72 and 73 of the initial report, we explained the workings of the rural election system then in force and our policy that village representatives should be elected on the basis of one-person-one-vote, with equal voting rights for men and women. At the time (mid-1998), some 30 villages (out of 693) had yet to adopt that system. We advised the Committee that we would continue to persuade those villages to comply. However, with the enactment of the Village Representative Election Ordinance, that position has been overtaken by events and the new electoral system described above now guarantees equal rights for both sexes.

359. Some 46% of the 80,000 electors who registered to vote in existing village elections were women. So too were 48% of the 78,000 who registered to vote in indigenous village elections. This was an encouraging start. The female participation rate was much lower among the election candidates. Some 25 female candidates stood for election as resident representatives (3.57% of all candidates) and four stood for elections as indigenous inhabitant representatives (0.34% of all candidates). However, the fact that women did participate was a significant advance in an area that has hitherto been dominated by tradition and their participation marked a new beginning.

Article 26: Right to equal protection before the law

360. In paragraph 15 of its concluding observations on the initial report, the Committee expressed concern that “no legislative remedies are available to individuals in respect of discrimination on the grounds of race or sexual orientation.” The Committee recommended that “Necessary legislation should be enacted in order to ensure full compliance with article 26 of the Covenant”.

Measures against discrimination

361. Sex discrimination and equal opportunities for women and men are discussed in paragraphs 104 to 118 above in relation to article 3. This section discusses the measures taken in relation to discrimination on other grounds.

Racial discrimination

362. In June 2003, following extensive consultations, we announced our intention to introduce legislation against all forms of racial discrimination as defined in article 1 of the International Convention Against All Forms of Racial Discrimination (ICERD). At the time of finalising this report, we were preparing the necessary law drafting instructions, the proposals of which will form a basis for consultations on the future Bill before its introduction into the Legislative Council. In the meantime, we are continuing our efforts to raise public consciousness of the issues and - through continuing educational initiatives - to foster a culture of mutual understanding, respect and tolerance.

Discrimination on the ground of age and sexual orientation

363. The general position is as explained in paragraph 2.8 of the second report under the ICESCR, in relation to article 2 of that Covenant. The position in regard to eliminating age discrimination in employment is as explained in paragraphs 175 to 178 of our second report under the CEDAW, in relation to article 11 of that Convention.

Disability discrimination

364. The position is essentially as explained in paragraphs 12.52 to 12.64 of our second report under the ICESCR, in relation to article 12 of that Covenant.

Discrimination on the ground of family status

365. The position is as explained in paragraph 496 of the initial report.

Need for a Mental Health Council?

366. Commentators consider that there is a need for a Mental Health Council to co-ordinate policy formulation, programme delivery, research and public education in the area of mental health. They also consider that such a Council would serve to safeguard the rights of persons with mental illness. The position is that the Department of Health deals with public education on all health matters and the Health, Welfare and Food Bureau is responsible for co-ordinating policies and programmes in the area of mental health. The Bureau, the Department, and the

Hospital Authority work closely together to provide the necessary services and support for the treatment and rehabilitation for persons with mental illness. Their approach to these tasks is multi-disciplinary and cross-sectoral. The present system works effectively and we see no strong need for the establishment of a Mental Health Council.

Use of new psychiatric drugs

367. Commentators have called on the Hospital Authority to make greater use of new drugs in the treatment of mental patients. The position is that, in 2000, an expert group of psychiatrists and pharmacists - formed by the Authority to appraise international and local evidence on the use of new psychiatric drugs - developed guidelines in accordance with its findings. The guidelines will be continuously reviewed as new evidence emerges, to ensure that they remain current. In 2001-02, about 3,000 patients were prescribed new anti-psychotics in accordance with the guidelines. Each year since then, the number of patients prescribed such drugs has increased. The Authority recognises that patients and their families need to be educated on the side effects of psychiatric drug treatment and hospitals have taken the initiative to counsel patients and their relatives on the side effects of psychiatric medication. They also provide them with pamphlets on the subject.

Article 27: Rights of the ethnic minorities

368. The position remains essentially as explained in paragraphs 513 to 522 of the initial report. But - in addition to the decision to legislate against racial discrimination (see paragraph 362 above in relation to article 26) - there have been significant developments in the provision of services to the minority communities.

369. With a non-Chinese population of 5.1%, Hong Kong is a relatively homogenous society. Before the 1990s, the minorities comprised mainly:

(a) **Foreign domestic helpers and contract workers (mostly, though not exclusively, from the Philippines):** this group entered Hong Kong to work on fixed-term contracts without a view to permanent settlement. As such, their families were not permitted to accompany them and they did not attract such social entitlements as education, welfare, or public housing, though they had access to heavily subsidised public medical treatment on the same basis as the local population. They comprised by far the majority of the non-Chinese population, a position that is unchanged except that there is now greater ethnic/national diversity and the numbers have continued to expand. To illustrate: at the end of 1993, there were nearly 121,000 foreign domestic helpers in Hong Kong, of whom over 105,000 (about 87%) were from the Philippines. As at 30 June 2003, the corresponding numbers were respectively 214,000 and 131,000 (61%). The proportional decline of the Filipino element was due to the sharp increase in the number of Indonesian helpers (about 6,000 (5%) in 1993, rising to nearly 74,000 (35%) by 30 June 2003);

(b) **Persons of South Asian origin:** these communities were well established and were part of the fabric of Hong Kong society. But, because Census data by ethnicity was not collected before the 2001 Census, we do not know what their numbers were before then. The communities were not entirely homogenous but were essentially self-sufficient, both economically and socially, though those in need had full access to all Government services on the same basis as the majority. Their children were educated either in local schools or overseas depending on family means and preference. The Census of March 2001 indicated that over 40,000 South Asians (excluding foreign domestic helpers) were then living in Hong Kong. But it is not known how many of them had actually settled here; and

(c) **'Expatriates':** a global term for mainly first world nationals¹ working in Hong Kong as managerial professionals, entrepreneurs, and academics. Relatively few persons in this category entered Hong Kong with a view to permanent settlement, though it was common for some to remain for many years. After meeting the required conditions² they were entitled to apply for permanent residence in accordance with the law. Permanent residence entitled them to

¹ Many also came from developing countries: a tendency that has increased over the last decade.

² After having ordinarily resided in Hong Kong for a continuous period of not less than seven years and having taken Hong Kong as their place of permanent residence.

such political rights as voting in elections and unimpeded entry into and egress from Hong Kong. But, other than access to medical treatment, few - if any - qualified for other social benefits, such as public housing or social welfare as their incomes exceeded the qualification limits. Their children were educated either locally (mostly in the numerous international schools) or overseas.

370. This pattern of settlement - and the fact that, as elsewhere, the provision of social services were for the benefit of persons in need - meant that, in practice, such provision was almost entirely a matter that concerned persons of Chinese origin. For that reason, the system was essentially geared to serving people who could speak and, usually, read and write, Chinese. But, from the early-1990s, the pattern of settlement began to change, with influxes of settlers from South and Southeast Asia. The former were mostly from Nepal and Pakistan, the latter from Indonesia, the Philippines, and Thailand. The following table illustrates the rapid increase of the Nepalese population:

As at end of the year	Permanent Resident	Temporary resident ³	Total
1990	162	178	340
1991	92	221	313
1992	68	353	421
1993	182	727	909
1994	806	1 125	1 931
1995	3 259	2 220	5 479
1996	5 518	4 490	10 008
1997	7 589	6 692	14 281
1998	8 434	8 917	17 351
1999	8 420	9 261	17 681
2000	8 653	8 522	17 175
2001	9 266	8 166	17 432
2002	9 931	7 679	17 610
30 June 2003	9 937	7 278	17 215

Note: These statistics are derived from the Immigration Department's movement records, which do not permit direct comparison with Census data. According to the 2001 Census, the number of Nepalese persons then present in Hong Kong was 13,000.

371. These changes took place gradually over the course of a decade and, because migration from places other than Mainland China was not regulated by a quota system, the growth of the new minorities went largely unremarked. Thus, in the early-1990s, the provision of services continued to develop on essentially unchanged assumptions about the nature and ethnic composition of our population. However, from 1998, newspaper articles began to focus public

³ Here, 'temporary residents' are mostly persons who have entered for settlement but have not yet completed the seven years of continuous residence necessary to qualify for permanent resident status.

attention on the difficulties that some of the new residents were experiencing. It is likely that the timing of those articles reflected the then recent completion of the new international airport project that had attracted migrant workers from South and Southeast Asia, some of whom then acquired residence either through marriage or other means.⁴

372. Initially, the articles prompted a ‘stock take’ of information then available from the key service providers (particularly the departments of Education, Employment, Health, Housing, Immigration, and Social Welfare), in order to obtain at least a provisional idea of the size and demographics of the new populations. Later we commissioned a consultancy to compile statistics on a more scientifically rigorous basis. Our findings led us to conclude that the settlement and social integration of the new minorities should be addressed as a matter of priority, with the Home Affairs Bureau co-ordinating Government action towards those ends. In so doing, we have:

(a) Placed the issue under the auspices of the Steering Committee on New Arrival Services, a high level inter-departmental body chaired in person by the Permanent Secretary for Home Affairs. The Committee’s remit is to ensure that the minority communities are aware of the services available to them, that those services are delivered when needed, and that the services so provided remain appropriate to the needs of our target clientele;

(b) Formed the ‘Committee on the Promotion of Racial Harmony’ (CPRH): this is a joint advisory body with a membership selected ad personam from the minority communities, persons working with the NGOs that serve them, and representatives of key Government departments. Its remit is to advise the Government on its strategy for promoting racial harmony, how best to improve existing services, and the formulation of new ones. Inter alia, initiatives include language courses, promotional campaigns, and the production of service guidebooks;⁵

(c) Established a Race Relations Unit to serve as Secretariat to the CPRH and to put its programmes into practical effect. The Unit also maintains a hotline for complaints and enquiries. Currently, it is working with NGOs and community representatives to design a programme for training community leaders from within the minority communities to improve

⁴ The Nepalese, however, are a special case. Several thousands of Nepalese soldiers served in the Gurkha battalions of the British garrison prior to July 1997. Many brought their families with them during their tour of duty and children born in the Gurkha barracks before 1983 were (remain) entitled to the right of abode under the Immigration Ordinance.

⁵ The guidebooks are entitled ‘Your guide to services in Hong Kong’. They are now available in seven languages and are continually updated to ensure that they remain current and comprehensive. We proactively seek feedback from our clientele with a view to obtaining suggestions for new topics and to ensuring continued accuracy.

liaison and to facilitate the settlement process. At the time of finalising this report, a working group convened by the Unit was preparing a pilot curriculum with a view to holding the first courses in January 2004;

(d) Provided funding for community level projects and public education initiatives, such as a racial harmony mural, television/poster campaigns and various projects promoting social cohesion funded under the Community Investment and Inclusion Fund; and

(e) Established the Mobile Information Service at Hong Kong International Airport. The service comprises a multi-ethnic, multi-lingual team of 'Information Ambassadors' under the supervision of the International Social Service (Hong Kong Branch), a non-governmental organisation that operates the service on the Government's behalf. Its task is to meet new arrivals and migrant workers when they arrive at the airport and to provide them with introductory 'service kits' that contain most of the information they will need to adapt to life in Hong Kong. The Ambassadors also answer enquiries and assist their clients with language difficulties to communicate with airport-based officials.

373. We recognise that this is only a beginning and that there is still much to do. The public service provision is adjusting - and will continue to adjust - to an ethnically, culturally, and linguistically diverse clientele, key sectors being education, employment, health, and welfare. This process will take time. But we are confident that, with the help of our community and NGO partners, our response to the needs of the minority communities will increasingly match the sophistication of the systems developed in jurisdictions with longer experience of ethnically plural migration for settlement.

Access to public sector employment

374. We briefly discussed this topic in paragraphs 477 to 480 of the initial report, in relation to article 25. However, the issues discussed there have largely been settled and the focus of public discussion has shifted to the question of employment opportunities for the ethnic minorities. We therefore consider that their discussion more appropriately belongs under article 27.

375. The Government is Hong Kong's largest single employer and recruitment is highly competitive. Being an equal opportunities employer, appointments to the Civil Service are based on open and fair competition. Entry requirements for civil service posts in general are set on the basis of academic or professional qualifications obtainable from local institutions or professional bodies (or equivalent), technical skills, work experience, language proficiency, and other qualities or attributes as may be required for particular jobs.

376. Nearly 95% of the members of the public whom we serve are Chinese (mostly Cantonese) speakers. At the same time, Hong Kong is a Special Administrative Region of the

People's Republic of China, whose common language is Putonghua⁶ and there is close liaison between local and Mainland officials. Additionally, as an international financial and commercial centre, English is an important working language, though there is also increasing use of Chinese in the day-to-day conduct of business. Thus, our long-term policy objective is to develop and maintain a civil service that can operate efficiently and effectively in the official languages of the Government. Achieving that objective will entail public servants becoming biliterate in Chinese and English and, eventually, trilingual in Cantonese, Putonghua, and English. Nevertheless, where operational needs so require, individual departments can seek exemption for candidates with special expertise but who do not meet the language proficiency requirements.

Representation in elected bodies

377. As explained in paragraph 514 of the initial report, 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 law. All permanent residents of Hong Kong who are Chinese citizens having ordinarily resided in Hong Kong for three years immediately preceding the nomination, irrespective of their race, are eligible to stand for election for a geographical or functional constituency of the Legislative Council, or for election by the Election Committee of that Council.

378. Additionally, 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 so elected, subject to their number not exceeding 20% 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.⁷ These constituencies are chosen on the basis that, given the nature of the profession or business they represent, there is a reasonable likelihood that their constituents will include foreign nationals.

379. 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)⁸ 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 the 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 naturalised upon approval of their applications:

- (a) They are near relatives of Chinese nationals; or

⁶ Also known as Mandarin.

⁷ Chapter 542.

⁸ The NLPRC is applicable to Hong Kong by virtue of article 18 of the Basic Law.

- (b) They have settled in China; or
- (c) They have other legitimate reasons.

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

District Council elections

380. All Hong Kong permanent residents who have ordinarily resided in Hong Kong for three years immediately preceding their nomination to a particular District Council may stand for election to that Council, irrespective of their race or national origin.

Chapter 28: Legislative proposals to implement article 23 of the Basic Law

Part A: General

381. The legislative proposals introduced in early 2003 and subsequently withdrawn in the latter part of the year have attracted extensive and detailed comment. While we cannot possibly present every such comment in this report, we consider it appropriate to advise the Committee of the current position, and to respond to the main points of contention.¹ In part B below, we address the principal concerns of our interlocutors in general terms. The official closing date for this report is 30 June 2003 and, for the most part, the report does not discuss events that took place after that date. However, because of the importance of the issue and because there were significant developments after 30 June, this chapter occasionally departs from that practice in order to present as complete a picture as possible.

382. In paragraph 357 of the initial report, we explained that:

“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.² 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 the provision. When such proposals are ready, there will be extensive public consultations before they are introduced into the Legislative Council. Any such proposal will need to address the concern - expressed by many commentators - that the requirements in 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.”

383. In paragraph 18 of its concluding observations, the Committee expressed the concern “that the offences of treason and sedition under the Crimes Ordinance are defined in overly broad terms, thus endangering freedom of expression guaranteed under article 19 of the Covenant. All laws enacted under article 23 of the Basic Law must be in conformity with the Covenant.”

384. Since then, we have formulated proposals to implement article 23 of the Basic Law (BL23). In February 2003, following extensive public consultation, we introduced the

¹ But we will send the Committee a copy of every written submission received in the pre-drafting consultations on this report.

² Article 23 also requires the HKSAR to enact laws to prohibit “theft of state secrets, to prohibit foreign political organisations from conducting political activities in the HKSAR, and to prohibit HKSAR political organisations from establishing ties with foreign political organisations.”

National Security (Legislative Provisions) Bill (the Bill) into the Legislative Council. In taking our proposals to this stage, we took full account of the 1999 concluding observations, and we rigorously adhered to our undertaking to ensure that the proposals were fully consistent with the rights and freedoms guaranteed in the Covenant, the Basic Law (particularly those in article 39), and the BORO. Nevertheless, and unsurprisingly in the context of Hong Kong's tradition of free speech and vigorous public debate, the proposals engendered much public debate.

Part B: Response to commentators

385. The responses we present in this section are in summary form only. Almost all of them have been the subject of extensive and detailed discussion papers that we have submitted to the Legislative Council in the course of the legislative process. Those papers - and, indeed, the Bill itself - are too extensive to incorporate here. But they are publicly available on a special website: (www.basiclaw23.gov.hk). And we will provide any or all of them to the Committee should Members so wish.

386. The concerns that the Bill has raised relate principally to the freedom of expression. But concerns have also been expressed regarding its implications for other provisions, such as those in articles 14, 17, 18, 21, and 22. With a view to cohesion, we have opted to address all concerns relating to the Bill in a discrete section of the report, rather than to address the individual concerns in the sections dealing with the rights in question.

The Basic Law and the constitutional duty to legislate

387. All nations have laws protecting national security. China is no exception. But article 18 of the Basic Law provides that "National laws shall not be applied in the Hong Kong Special Administrative Region except those listed in Annex III to this Law". Annex III does not include the national security laws that apply in Mainland China. Instead, BL23 imposes a constitutional obligation on the HKSAR to:

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

The intent of article 23 is to require the HKSAR to enact laws on its own to prohibit acts that would undermine China's sovereignty, territorial integrity, unity and national security.

Constitutional protections under the Basic Law

388. The legislation to meet the BL23 obligation must be consistent with the Basic Law as a whole. That includes the protections of fundamental rights and freedoms

enshrined in Chapter III of the Basic Law,³ in particular BL39,⁴ which imposes a constitutional obligation to ensure that the ‘BL23 law’ is consistent with the Covenant and the ICESCR.

Legislative process

389. In September 2002, we published a public consultation document, explaining the guiding principles on which we had formulated our proposals for implementing BL23. The aim was to solicit public views before drafting legislation. The proposals had been formulated after extensive examination of our existing laws, the national security laws of other jurisdictions, and the relevant legal and human rights principles. They sought to modernise the existing laws and were comparable with laws of other major common law jurisdictions. That these proposals complied with the international human right standards enshrined in the Basic Law has been confirmed by an internationally renowned human rights law specialist.⁵

390. The process of consultation was open, transparent and widely publicised by the media. Over 70,000 copies of the consultation document and one million copies of an explanatory leaflet were distributed. The proposals and related materials were made available on the Government website. Government representatives discussed the proposals and listened to opinions at over 250 forums, seminars, and media interviews, and public hearings held by the Legislative Council and all 18 District Councils.

391. More than 100,000 submissions on the proposals were received and were published in ‘Compendium of Submissions’, which was made available for public inspection. The compendium is also available on our website.

392. We introduced the Bill into the Legislative Council in February 2003. The Bill sought to implement BL23 by amending existing Ordinances, primarily the Crimes Ordinance (Chapter 200), the Official Secrets Ordinance (Chapter 521), and the Societies Ordinance (Chapter 151). It took full account of the views expressed during the public consultations

³ In this context, key rights and freedoms include article 27 on the protection of the freedom of speech, of the press, of publication, of association, of assembly, of procession, and of demonstration; article 32 on the protection of the freedom of religious belief; and article 34 on the protection of the freedom to engage in academic research, literary and artistic creation.

⁴ BL39 provides that “The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this article.”

⁵ Mr. David Pannick QC.

and the guiding principles in paragraph 331 above. In particular, it explicitly provided that all provisions in the relevant parts of each Ordinance being amended must be enforced, applied, and interpreted in accordance with article 39 of the Basic Law,⁶ and hence with the Covenant as applied to Hong Kong.

393. The Bill was openly and rigorously scrutinised by a Bills Committee of the Legislative Council in over 100 hours of meetings held between March and June 2003. Over 100 individuals and NGOs made representations to the committee in four special sessions. More than 100 papers relating to the Bill were prepared for legislators. The papers are publicly available, and most can be accessed on the BL23 website (paragraph 385 above).

394. In June and July 2003, in the light of the views expressed by legislators and the public, we proposed further amendments to narrow the definitions and scope of offences and to provide additional safeguards. A key proposal was explicitly to provide in the Bill that its provisions must be enforced, applied, and interpreted in accordance the whole of Chapter III of the Basic Law, rather than article 39 alone as previously proposed, so ensuring the new law's compliance with all the human rights guarantees specified in that Part. Three further amending proposals sought to alleviate public concerns about the proposed proscription mechanism, the emergency investigative powers of the Police, and the absence of a 'public interest' defence for the offence of unlawful disclosure.

395. We firmly believe that, if enacted, the Bills proposals would have complied fully with international standards on the protection of fundamental rights and freedoms, including the Covenant. The additional safeguards and tighter definitions proposed during the course of the Bill's security would further enhance that protection. At the same time, we fully agree that public understanding and acceptance is essential and, in the light of continued public concern, we decided (in September 2003) to withdraw the Bill from the legislative programme, and to re-examine the issues. In so doing, we pledged to consult the community extensively before taking forward any legislative proposals. There is no predetermined timetable for the re-examination or legislative work.

Way forward

396. We will now re-examine the issues in the light of public comment and will continue fully to engage the public and all concerned parties in the ongoing discussion of the way forward. There is no pre-determined timetable for the exercise. But, at the risk of repetition, we must emphasise again that the HKSAR has a clear constitutional duty to implement article 23 of the Basic Law. The community also recognises that obligation.

⁶ See Clause 7 (new section 18A of Cap 200); Clause 9 (new section 12A of Cap 521); and Clause 14 (new section 2A of Cap 151) of the Bill.

Article 40: Submission of report

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

398. In accordance with established practice, the method of consultation was to publish an article-by-article outline of 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.

399. During the consultations, in the first half of 2003, the Government drafting team met NGOs and others to discuss the issues and to exchange views on the consultation process. Again, in accordance with the established practice, the report will be published - in bound, bilingual format - after its submission to the Committee. We have also introduced the practice of issuing CD-ROM editions, also free of charge.

400. Also in accordance with established practice, copies of the Concluding Observations on the initial report were sent to the Judiciary as well as to legislators, NGOs and other interested parties after the hearing in November 1999. We also uploaded them onto the Internet.

List of annexes

- 1 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China
- 2 Hong Kong Bill of Rights Ordinance
- 3 Human Rights Training for Government Officers
- 4 Institution for young offenders
- 5 Rules for the processing and issue of Hong Kong Special Administration passports (as prescribed in the Hong Kong Special Administrative Region Passports Ordinance (Chapter 539))
- 6 Law Reform Commission's report on stalking: summary of recommendations
- 7 Non-Governmental Organisations with an active interest in human rights issues
- 8 Major proposed legislation of the Adoption Ordinance (Chapter 290)
- 9 Extract from the Village Representative Election Ordinance (Chapter 576)
