

香 港 人 權 監 察  
HONG KONG HUMAN RIGHTS MONITOR

Submission to the Legislative Council  
Panel for Home Affairs  
Regarding the Report of the Hong Kong Special Administrative Region  
of the People's Republic of China

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Rm 603, 6/F, 18 Lyndhurst Terrace, Car Po Commercial Building, Central, Hong Kong  
Phone: (852) 2811-4488 Fax: (852) 2802-6012  
Email: [contact@hkhrm.org.hk](mailto:contact@hkhrm.org.hk) Home page: <http://hkhrm.org.hk>

Chairperson: Dr. Stephen Ng Deputy Chairpersons: Philip J. Dykes Q.C., S.C. & Raymond Tsui Secretary: Belinda Winterbourne Treasurer: Lai Wing Yiu

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## PART I

### Institutions Important to the Protection of Rights

The Hong Kong Human Rights Monitor expresses serious concern over the erosion of institutions important to the protection of economic, social and cultural rights in Hong Kong since the transfer of sovereignty from the United Kingdom to the People's Republic of China. These erosions include the attacks by the Hong Kong Government on the judiciary, the rollbacks on democracy and the rule of law. More details can be found in our *Submissions to the United Nations Human Rights Committee regarding the SAR Government's ICCPR Report 1999*<sup>1</sup>. We also ask your Panel to refer to the Human Rights Committee's Concluding Observations on Hong Kong issued in November 1999 for the latter's concerns over these issues.

Incidents after the Handover of sovereignty, especially the re-interpretation of the Basic Law, have revealed the defects in our mini-constitution, the Basic Law. They confirmed that the power and role of the judiciary have been substantially diminished in its effectiveness to review decisions made, acts done and legislation introduced by the administration and in its ability to check the abuse of power by the sovereign state under the new constitutional order and political landscape. According to the Hong Kong Government, the Standing Committee of the National People's Congress has the power to interpret any provision of the Basic Law (not restricted to those provisions outside the limit of autonomy of the Hong Kong Special Administrative Region) at any time before, during and after the final adjudication of the Hong Kong Court of Final Appeal or even when there is no case pending before the court. Moreover, the Hong Kong Government has refused to undertake not to seek an interpretation again. The new constitutional order and the new political landscape of Hong Kong which impose very little democratic check on the Hong Kong and the Central Governments, and put the Hong Kong Government and the Chinese Central authorities in a position to overcome the check of the judiciary even without the need to amend the law including the Basic Law. The balance of power of the three branches of government in Hong Kong has been fundamentally upset. The judiciary's effectiveness to check the Government is therefore undermined.

The independence of the judiciary is threatened by the Hong Kong SAR Government and the Central Authorities. Since it is now "legal and constitutional" according to

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<sup>1</sup> <http://hkhrm.org.hk/english/reports/99ICCPR.html>

the Hong Kong Government under our new constitutional order to circumscribe the check of the court in cases which are politically sensitive or important to the Government in other ways, the Court may need to weigh sometimes whether to rule against the Government in fear of further insult in the form of request for clarification of its judgments after a case is closed or even be humiliated by another re-interpretation of the Basic Law by the Standing Committee. The Court's authority is also seriously undermined now that the public may suspect that the judiciary may need to decide cases with fear and favour.

The UN Human Rights Committee in its Concluding Observations on Hong Kong issued in November 1999 states,

" The Committee is seriously concerned 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 Standing Committee of the National People's Congress (NPC) (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 has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains 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. "

Moreover, the democratization process is very much restricted by the Basic Law. The electoral framework laid down in the Basic Law basically denies the right of Hong Kong people to universal and equal suffrage for a decade and puts in huge obstacles in the way forward by giving the Chief Executive and functional constituency Legislative Councillors effectively the power to veto any meaningful progress (Basic Law, Annex II, Part III). The Basic Law also further restricts the power of the Legislative Councillors to move private member's bills, which include those for the furtherance of human rights, by requiring the consent of the Chief Executive on practically most issues (Basic Law, Article 74) and prevents any private member's bill from getting through by requiring majorities among the functional constituency members and members returned in the geographical and election committee elections (Basic Law, Annex II, Part II).

The Hong Kong Government under Chief Executive Tung Chee-hwa has further rolled back the limited democracy in Hong Kong by re-introducing appointed members into District Councils, by abolishing the municipal councils (another level of elected local assemblies), and by manipulating the design of the electoral methods.<sup>2</sup>

The UN Human Rights Committee in its 1999 Concluding Observations on Hong Kong states,

"The Committee reiterates 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 Hong Kong Government has also rolled back a number of civil and labour rights laws. Both the Human Rights Committee and the Freedom of Association Committee of the International Labour Organisation have criticized many of these rollbacks, in particular the restrictions placed on the autonomy of trade unions, on freedoms of association and assembly.

Human Rights Monitor urges your Panel to question the Hong Kong Government on the implications for the protection and promotion of the economic, social and cultural rights in the light of (1) the Hong Kong Government's attacks on the rule of law in Hong Kong especially in the form of seeking an interpretation or a re-interpretation by the Standing Committee of the National People's Congress; (2) its attacks on the limited democracy in Hong Kong and its refusal to bring the electoral system in line with the ICCPR; and (3) its enactment of laws inconsistent with international human rights standards.

We also urge your Panel to express serious concern over the threats to the effectiveness and independence of the judiciary, the refusal of the Government to implement universal and equal suffrage, and the rollbacks in civil and labour laws.

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<sup>2</sup> See Hong Kong Human Rights Monitor Report on 1998 Legislative Council Elections at [http://hkhrm.org.hk/english/reports/eng\\_elerpt.html](http://hkhrm.org.hk/english/reports/eng_elerpt.html).

We ask your Panel to recommend immediate and effective measures by the Hong Kong Government to address these concerns including amendments to the Basic Law and other related laws.



## PART II

### Implementation of the Covenant

#### ARTICLE 1

Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (hereinafter “Covenant”) provides that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

The right to democratic governance is an essential component of the right to self-determination. Economic, social and cultural rights will only be respected when there is a government accountable to its people. Accountability is established through popular elections and respect for the rule of law.

##### *1.1 Popular Elections*

Hong Kong’s political system has undergone much change since 1 July 1997. The SAR Government has willfully and systemically dismantled democratic institutions introduced by the out-going colonial administration. All three tiers of elected councils -- the Legislative Council, Municipal Councils and the District Boards -- were abolished by the SAR authorities on 1 July 1997.

Article 68 of the Basic Law guarantees that the “Legislative Council of the Hong Kong Special Administrative Region shall be constituted by election.” However, even prior to the handover, the Provisional Legislative Council was already established and enacting laws on behalf of Hong Kong. The 60 members of the Provisional Legislative Council were selected by a group of 400 electors, who were in turn handpicked by Beijing. The term of Provisional Legislative Council ended in May 1998, but during their short tenure, the body worked quickly to dismantle a number of legal protections for rights.

In May 1998, the Government held elections for the Legislative Council. Of the 60 seats the Legislative Council, 20 seats were elected by geographical constituencies through direct elections, 30 were elected by functional constituencies, and 10 were elected by an election committee. In the second term of the Legislative Council, from the years 2000 – 2004, the number of seats elected by geographical constituencies, functional constituencies, and an election committee will be,

respectively, 24, 30, and 6.

The scheme for the election of the Legislative Council ensures that popularly elected candidates will be outnumbered by candidates representing business and professional interests. This will have disastrous consequences for the protection of economic, social and cultural rights. Particularly damaging is the functional constituency system which allows for companies and professional organizations to elect their own representatives to the Legislative Council, and allows for the control of multiple votes by influential businessmen.<sup>3</sup> For example, one property developer who owned in 1998 at least 17 of the companies registered in the Real Estate functional constituency, and two other companies which vote in the Tourism functional constituency will be able to control 19 votes in the 1998 Legislative Council election. Another harmful outcome of the functional constituency system is that women are underrepresented since the professional groups are dominated by men.

The Government has further attacked the limited democracy in Hong Kong by scrapping the elected Municipal Councils (Urban Council & Regional Council) and re-introducing appointed members to the District Boards (renamed “District Councils” in the year 2000).

Human Rights Monitor requests your Panel to call upon the Government to provide for better guarantee of economic social and cultural rights by ensuring that the Legislative Council and the District boards be subject to popular elections, respecting genuine universal and equal suffrage.

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<sup>3</sup> There are 25 professional functional constituencies listed in Schedule 1 of the Legislative Council Ordinance are as follows: Agriculture and fisheries functional constituency; Insurance functional constituency; Transport functional constituency; Education functional constituency; Legal functional constituency; Accountancy functional constituency; Medical functional constituency; Health Services functional constituency; Engineering functional constituency; Architectural, Surveying, and Planning functional Constituency; Labour functional constituency; Social Welfare functional constituency; Real Estate and Construction functional constituency; Tourism functional constituency; Commercial (First) functional constituency; Commercial (Second) functional constituency; Industrial (First) functional constituency; Industrial (Second) functional constituency; Finance functional constituency; Financial Services functional constituency; Sports, performing arts, culture and publication, functional constituency; Import and export functional constituency; Textiles and garment functional constituency; Wholesale and retail functional constituency; Information Technology functional constituency.

## 1.2 *Rule of Law*

### *Equality before the law*

One element of rule of law is equality before the law. In the past year a number of cases strongly support the suspicion that people and organizations close to the Beijing authorities enjoy immunity from Hong Kong laws. For example, in 1998, the Secretary of Justice Elsie Leung declined to prosecute Sing Tao Holdings Chair Sally Aw Sian for an alleged fraud. Ms. Aw is a member of the Chinese People's Political Consultative Conference and a family friend of Chief Executive Tung Chee Wah. In the same year, the Department of Justice also decided not to prosecute the New China News Agency for breaching the Privacy Ordinance.<sup>4</sup>

The Adaptation of Laws Ordinance, enacted by the Provisional Legislative Council, formally granted legal immunity to the People's Republic of China's Central Authorities (hereafter "Central Authorities") from Hong Kong laws. The Adaptation Ordinance provides that the Central Authorities are not bound by any Hong Kong ordinance, unless expressly stipulated, thereby exempting mainland organs from nearly 500 statutes. This Ordinance is contrary to Article 22 of the Basic Law, which states that "all offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region."

### *Judicial independence*

Another component of the rule of law is judicial independence. Article 2 of the Basic Law of Hong Kong provides that the Hong Kong Special Administrative Region will "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication." Furthermore, Article 18(2) of the Basic Law prevents the application of Mainland criminal laws to acts committed in Hong Kong, and Article 19(2) ensures that Hong Kong courts have jurisdiction over all Hong Kong cases. Article 22(1) of the Basic Law requires all Mainland authorities not to interfere in affairs over which the Hong Kong courts have

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<sup>4</sup> Xinhua failed to respond within the 40-day statutory limit to Legislative Councilor Emily Lau's request for information about whether the Agency kept a file on her. The Chief Executive said that the offence was merely "technical," as opposed to "substantive."

jurisdiction.<sup>5</sup>

Despite these provisions, China has asserted criminal jurisdiction over two cases that should have been dealt with by Hong Kong courts. The “Big Spender” case<sup>6</sup> of 1998 involved Hong Kong defendants and victims; additionally, the crime at issue were committed on Hong Kong territory. Following the commission of the crime, the defendants escaped to the Mainland, where they were arrested by Mainland police officers, tried under Mainland criminal law without their own counsel, sentenced to death without the right to appeal, and immediately executed. The Secretary for Justice did not apply for the extradition of the five suspects. She even went as far as to defend the Mainland courts’ reasoning that the suspects “planned the crimes in the Mainland” and, therefore, could be tried under Mainland law. But Hong Kong common law – under which the suspects should have been tried – only punishes attempts, not planning.

In the “Telford Garden” case<sup>7</sup>, the defendant was a Chinese citizen and his victims were five Hong Kong women; the crimes occurred on Hong Kong territory. He later escaped to the Mainland and was arrested and tried under Mainland criminal law under the same conditions in which Big Spender and his accomplices were tried, and executed. Since the alleged crime was committed in Hong Kong, Hong Kong courts should have had jurisdiction over the cases. Again, the Secretary for Justice failed to seek the extradition of the defendant.

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<sup>5</sup> Article 18(2): “National law shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to the Law [which have nothing to do with criminal codes]...”

Article 19(2): “The courts of the Hong Kong Special Administrative Region 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.”

Article 22(1): “No department of the Central People’s Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law.”

<sup>6</sup> The Big Spender Case involved a Hong Kong permanent resident (popularly known as “Big Spender”) and his four accomplices, also Hong Kong permanent residents, who kidnapped two local tycoons for ransom. The kidnappings occurred on Hong Kong territory. After they received the ransom, the kidnappers released the two victims, and fled to the Mainland.

<sup>7</sup> This case involved a geomancy consultant, who defrauded five Hong Kong women clients by convincing them to withdraw all their money from their bank accounts, to give the money to him, and then to drink poison in one of the victim’s Telford Garden residence.

The Hong Kong Government has shown flagrant disrespect for the authority of the Court of Final Appeal by refusing to implement its judgment. On 29 January 1999, the Court of Final Appeal issued a judgment pronouncing that children who were born out of wedlock or born prior to their parent's acquisition of permanent resident status should enjoy the right of abode in Hong Kong. Rather than taking appropriate measure to implement the Court's decision, the Government instead undertook a publicity campaign to raise public alarm about the financial implications of the decision. In May 1999, the Government requested the Standing Committee of the National People's Congress to overturn the Court of Final Appeal's decision by re-interpreting the relevant provision in the Basic Law relating to the right of abode.

Your Panel should urge the Government to respect the rule of law by ensuring that all persons and institutions are equal before the law and by resisting any interference with the courts' independence or exercise of criminal jurisdiction.

## ARTICLE 2

### 2.1 *Adoption of legislative measures generally*

Article 2(1) obliges a State Party to “achiev[e] progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The UN Committee on Economic Social and Cultural Rights has further stated in General Comment 3 that “in many instances legislation is highly desirable and in some cases may even be indispensable.”<sup>8</sup>

As discussed in subsequent sections of this Report, the Government often has failed to pass legislation necessary for protecting the rights guaranteed in the Covenant or providing effective remedies when such rights are breached, or has repealed legislation which previously implemented these rights.<sup>9</sup> While certain individual legislators have attempted to introduce bills that would ensure compliance with the rights articulated in the Covenant, the Basic Law severely restricts the ability of individual legislators to take such action. According to Article 74 of the Basic Law,

“[m]embers of the Legislative council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provision of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.”

Clearly, the prohibition against private member bills that relate to government policy constitutes a overly-broad exception which effectively eliminates the ability of individual members of the Legislative Council to introduce bills without the written consent of the Chief Executive. Even under British colonial rule, private member bills were only subject to the restriction that they not entail an increase in government expenditure. In July 1999, the President of the Legislative Council rejected the tabling of two private member bills that would have established collective bargaining

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<sup>8</sup> General Comment 3, at paras. 3 and 7.

<sup>9</sup> For example, in the section on Article 8 of the Covenant regarding the right to form and join trade unions, the Report discusses the failure to amend the Employment Ordinance and the Trade Unions Ordinance to implement the recommendations of the ILO Committee on Freedom of Association.

rights and effective remedies for anti-union discrimination.<sup>10</sup>

Human Rights Monitor requests your Panel to urge the Government to pass legislation to protect the rights guaranteed in the Covenant and to provide effective remedies when such rights are breached; and to amend the Basic Law so that individual members of the Legislative Council may introduce bills without prior consent of the Chief Executive, so long as such bills do not involve an increase in government expenditure.

## 2.2 *Incorporation of the Covenant into domestic law*

In interpreting Article 2, the UN Committee on Economic Social and Cultural Rights has made a distinction between “obligations of conduct” and “obligations of result.” Notably, the Committee has stated that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.”<sup>11</sup>

In paragraph 14(a) of its Concluding Observations on the previous report, the Committee expressed disappointment that “[t]he provisions of the [Covenant] continue to be excluded from the domestic law of Hong Kong, which already contains the provisions of the International Covenant on Civil and Political Right.” In General Comment 9, the Committee has also stated that “while the Covenant does not formally oblige States to incorporate its provisions in domestic laws, such an approach is desirable.”<sup>12</sup>

While the Article 39 of the Basic Law does state the Covenant shall be implemented as part of Hong Kong’s law, there is no ordinance which explicitly makes the Covenant a source of justiciable rights. The Government justifies this failure to introduce appropriate legislation by interpreting Article 2(1) as imposing an obligation to pursue merely a “progressive process” of adopting legislative or administrative measures.<sup>13</sup> This reading is contrary to the Committee’s interpretation of Article 2(1), as indicated in the preceding paragraph, which emphasizes that the

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<sup>10</sup> “Rita Fan ‘conspiring to kill private bills’,” South China Morning Post (20 July 1999).

<sup>11</sup> General Comment 3, at para. 3.

<sup>12</sup> General Comment 9, at para. 8.

<sup>13</sup> Report of the Hong Kong Special Administrative Region of the People’s Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights (hereinafter “HKSAR Report”), at para. 3.

“progressive” nature of the government’s obligations relates only to the realization of rights.

Moreover, Human Rights Monitor believes that the Government’s obligations under the Article 2 of the Covenant are not fulfilled if it merely chooses to adopt legislative or administrative measures that implement the Covenant in a piecemeal manner. The Government has not sufficiently justified its failure to comprehensively implement the Covenant. Human Rights Monitor requests your Panel to urge the Hong Kong Government to pass comprehensive legislation which makes all the provisions of the Covenant a source of justiciable rights in Hong Kong.

### 2.3 *Establishment of a human rights commission*

The UN Committee on Economic Social and Cultural Rights has recognized that the establishment of a human rights commission is one of the “appropriate means” envisioned by Article 2(1) of the Covenant.<sup>14</sup> The important role that human rights commissions may play in the protection and promotion of human rights has also been affirmed by the United Nations General Assembly and the Commission on Human Rights.

Despite repeated recommendations by the UN Committee on Economic Social and Cultural Rights and the Human Rights Committee, and by the UN High Commissioner for Human Rights, the Government has continued to resist calls for the establishment of a human rights commission in Hong Kong. Citing the rule of law, the independent judiciary, the Bill of Rights and institutions such as the Ombudsman’s Office, the Equal Opportunities Commission, the Privacy Commissioner’s Office and the legislature, the Government states that it “does not see any obvious advantage in introducing a new institution such as a Human Rights Commission.”<sup>15</sup>

Several developments in the past years alone highlight the weaknesses of these institutions and the need for a human rights commission. For example, the independence of the judiciary was severely undermined by the Government’s request on 18 May that the Standing Committee of the National People’s Congress re-interpret a legal issue that had already been decided by Hong Kong’s Court of Final Appeal. The incident demonstrated the Government’s willingness to ignore the

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<sup>14</sup> See General Comment 10.

<sup>15</sup> HKSAR Government Report, at para. 33, 34.



finality of judgments by Hong Kong's highest court and to resort to political mechanisms when displeased by the court's decisions.

The independence of the Office of the Ombudsman has also been called into question. In 1998, the Chief Executive declined to renew Andrew So's tenure as Ombudsman, despite his expressed wish to remain in office and considerable public support for him to continue; instead, Mr. So was replaced by Alice Tai, who had been a civil servant for 24 years. It was widely reported that the Government's refusal to retain Mr. So was due to his vigorous investigation into government maladministration and his attempts to expand the Ombudsman office into a broad-based human rights body.<sup>16</sup> The Ombudsman Ordinance (Cap. 397) contains a number of restrictions which prevent the Office of the Ombudsman from functioning as an independent and effective national human rights commission as envisioned in the "Principles relating to the status of national institutions" (also known as the "Paris Principles").<sup>17</sup> For example, the Paris Principles provide that the appointment of the members of the national human rights institution shall be in accordance with a procedure that ensures a pluralistic representation of society. Section 3 of the Ombudsman Ordinance, however, merely states that the Chief Executive shall appoint the Ombudsman Ordinance. Not only is there is no opportunity for input into the selection process from other branches of government or from the public, but the Ordinance does not establish any criteria for suitable candidates. Similar problems may be found in the appointment of the Commissioner of the Independent Commission Against Corruption and the Equal Opportunities Commission.

Moreover, the jurisdiction of the Ombudsman is severely limited by broad and vague exceptions in the Ombudsman Ordinance. According to Section 7 of the Ombudsman Ordinance, the Ombudsman may only investigate actions taken by or on behalf of specified government departments.<sup>18</sup> With regard to the Hong Kong Police force, however, the Ombudsman may only investigate actions in the "exercise of its administrative functions in relation to the Code on Access to Information published

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<sup>16</sup> Gren Manuel, "A new watchdog in the jungle." South China Morning Post (27 December 1998).

<sup>17</sup> "National institutions for the promotion and protection of human rights," United Nations General Assembly Resolution No. 134, U.N. Doc. A/RES/48/134 (20 December 1993), Annex.

<sup>18</sup> Section 7(1) of the Ombudsman Ordinance states that "The Ombudsman may investigate any action taken by or on behalf of (a) an organization set out in Part I of Schedule 1 in the exercise of its administrative functions; or (b) an organization set out in Part II of Schedule 1 in the exercise of its administrative functions in relation to the Code on Access to Information published by the Government."

by the Government.” The Ombudsman is also barred from investigating “[a]ny action taken in matters certified by the Chief Executive as affecting security, defence or international relations (including relations with any international organization) in respect of Hong Kong.” Restricting the jurisdiction of the Ombudsman in this manner is incompatible with the Paris Principles, which provide that a “national institution shall be given as broad a mandate as possible.”

Finally, Section 15 of the Ombudsman Ordinance, however, requires the Ombudsman and his staff to maintain secrecy regarding any investigation or complaint; individuals who breach the secrecy of a complaint may be subject to a \$50,000 fine or imprisonment for two years. In practice, this has meant that when a Justice of the Peace, responsible for inspecting prisons in Hong Kong, refers a prisoner complaint to the Ombudsman, he is unable to learn about the outcome of the complaint because of the Ombudsman’s obligations to maintain secrecy.<sup>19</sup> While the secrecy requirement does not apply to the Ombudsman reports to the head of the affected organization, the complainant or the Chief Executive, when the Ombudsman releases a report to the general public, he may not reveal the identity of the person aggrieved, the complainant, or officers who are the subject of the investigation. These strict requirements for secrecy are contrary to the Paris Principles. While mindful of the need for maintaining the integrity of the investigation process, the Paris Principles also recognize that publicizing abuses is necessary for generating moral opprobrium for such actions (since national human rights institutions may not have independent enforcement powers) and promoting awareness about issues. Accordingly, the Paris Principles provide that a national institutional shall be empowered to “address public opinion directly or through any press organ, particularly to publicize its opinions and recommendations.”

Given the absence of effective government institutions for promoting and protecting human rights, Human Rights Monitor requests your Panel to continue to emphasize the importance of establishing an independent and effective human rights commission in Hong Kong.

#### *2.4 Legislation prohibiting discrimination on the basis of age, race or sexual orientation*

Article 2(2) of the Covenant obliges governments to “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

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<sup>19</sup> Home Affairs Department, Justice of the Peace Consultation Paper (1999)

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

While Hong Kong has legislation prohibiting discrimination on the basis of sex, disability, and family status, there is no legislation regarding discrimination on the basis of age, race or sexual orientation except the Bill of Rights Ordinance which binds only the Government and public authorities. The Government justifies its omission on the grounds that it “must be attentive to the climate of public opinion. . . . Legislation with wide-reaching social implications requires the support of the community or it will not be effective.”<sup>20</sup> The Government cites consultations and public opinion surveys in which a majority of the respondents were opposed to anti-discrimination legislation. The reliance of the Government on these reasons is ironic because anti-discrimination legislation is all the more imperative precisely when there is a failure of the public to acknowledge that there exists a problem with discrimination and to recognize that people who are subject to discrimination on these bases deserve equal rights and remedies for the violation of their right.

The Government goes on to say that it has undertaken educational measures to address discrimination on the bases of age, race or sexual orientation. These measures would include the issuing of codes and guidelines against employment discrimination on these bases. Unlike the Code of Practice on Employment under the Sex Discrimination Ordinance and the Code of Practice on Employment under the Family Status Discrimination Ordinance, however, the codes relating to discrimination on the basis of age, race or sexual orientation have no enforcement power. The failure to adhere to the codes addressing sex or family status discrimination may at least be cited as evidence of discrimination in legal proceedings.<sup>21</sup> Since there are no legal prohibitions on discrimination on the basis of age, race or sexual orientation, codes of practice are unlikely to influence the behaviour of employers.

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<sup>20</sup> HKSAR Report, at para. 16.

<sup>21</sup> According to paragraph 4.2 of the Code of Practice on Employment under the Sex Discrimination Ordinance: “A failure on the part of a person to observe any of the recommendations contained in this Code does not automatically render him or her liable to any proceedings. However, if a person is accused of discrimination, sexual harassment or victimisation, failure to implement the recommendations outlined in this Code could be used as evidence in a court of law. This applies to both employers and employees, as well as agents and principals.” Paragraph 4.2 of the Code of Practice on Employment under the Family Status Discrimination Ordinance contains a similar provision.

Human Rights Monitor has requested the Government to require various bodies to adopt these codes of practice, including government employers, those employers participating in government contracts and government subvention agreements, social service agencies, schools and universities and non-governmental organisations. However, the Government has resisted such calls.

Subsequent sections of this report will address with greater detail discrimination on the basis of age, race or sexual orientation in specific contexts, such as housing, welfare, employment, and education.

Human Rights Monitor requests your Panel to continue to call upon the Government to pass legislation prohibiting discrimination on the basis of age, race or sexual orientation, to provide effective remedies for individuals who are subject to such discrimination, and to make existing codes of practice binding on as broad a range of employers as possible.

### ARTICLE 3

Article 3 of the Covenant obliges States to “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

Since the handover, there has been regression in human rights protection in Hong Kong. Constitutional and legal protections of women's rights and human rights have been eroded. The regression in human rights protection mostly took the form of the rolling back of civil rights laws and the introduction of new laws restricting rights. With Hong Kong's economic downturn, any harm to economic, social and cultural rights have also had a disproportionately severe impact on women.

The violations of the obligation to ensure the equal enjoyment of rights, without regard to gender, will be treated in greater detail in the substantive discussions of the particular rights of the Covenant. Here, Human Rights Monitor will only briefly note that gender issues have been raised in the following:

Article 6: Violations of the freedom to choose work, relating to sex discrimination in employment opportunities and gender stereotyping in vocational training.

Article 7: Violations of the right to just and fair working conditions, relating to equal remuneration for work of equal value and sexual harassment in the workplace.

Article 9: Violations of the right to social welfare, relating to childcare and the Comprehensive Social Security Assistance Scheme and deficiencies in the Mandatory Provident Fund.

Article 10: Violations of obligation to protect the family, relating to maternity protection generally and as denied to foreign domestic helpers.

Article 12: Violations of the right to health, relating to lack of government policy on breast-feeding.

Articles 13 and 14: Violations of the right to education, relating to gender stereotyping in education.

## ARTICLE 4

Article 4 establishes that the rights recognized in the Covenant shall be subject “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

### 4.1 *Limitations to rights recognized in the Covenant*

The Emergency Regulations Ordinance (Cap. 241) grants the Chief Executive sweeping powers to “make any regulations whatsoever which he may consider desirable in the public interest” during times of emergency or public danger.<sup>22</sup> Emergency regulations may empower the Government to require persons to do work or render services, or to appropriate or control property, which may potentially violate Articles 7 and 11, respectively, of the Covenant.

The Emergency Regulations Ordinance does not conform to the requirement in Article 4 of the Covenant that any limitation on rights must be compatible with the nature of the right and necessary to promote the “general welfare in a democratic society.” The United Nations Human Rights Committee has already expressed its concern over the scope of the Emergency Regulations Ordinance and its incompatibility with the International Covenant on Civil and Political Rights which also requires that any restrictions on rights be narrowly construed and strictly necessary. Since the Emergency Regulations Ordinance contravenes the Covenant, it is violates Article 39 of the Basic Law which requires that “restrictions [on rights and freedoms] shall not contravene the provisions” of the Covenant. Accordingly, the Government has an obligation to revise the Emergency Regulations Ordinance and repeal all provisions that violate the Covenant and the Basic Law.

Article 18 of the Basic Law further provides that the Standing Committee of the National People’s Congress may declare a state of emergency “by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the region.” In a state of war or emergency, the Central People’s Government may apply relevant national laws in the Region. Amendment of Article 18 is necessary given the deficiencies and vagueness in the provision. First, Article 18 lacks procedural and other safeguards regarding the declaration of a state of emergency. Second, key words such as

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<sup>22</sup> Section 1 of the Hong Kong Emergency Regulations Ordinance, (Cap. 241).

“turmoil” and endangerment of national unity are left undefined, leaving the provision open to abuse. Third, Article 39 of the Basic Law provides that the “rights and freedoms enjoyed by Hong Kong Residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene” the ICESCR, the ICCPR and the international labour conventions. However, it is unclear whether the word “law” as used in Article 39 and the requirement of the law’s conformity with international human rights standards applies also to Chinese national laws when they are extended to Hong Kong by means of Article 18.<sup>23</sup> Article 18 of the Basic Law should be amended to clarify that the application of Chinese national laws to Hong Kong is subject to Article 39 requirement of conformity with international HR law. Finally, the scope of Article 18 exceeds the requirements of necessity and conformity with human rights imposed by Article 4 of the Covenant.

Human Rights Monitor asks your Panel to request that the Government amend the Emergency Regulations Ordinance and Article 18 of the Basic Law to bring them in conformity with Article 4 of the Convention.

#### 4.2 *Validity of declarations and reservations to the ICESCR*

Upon ratifying the Covenant in 1976, the Government of the United Kingdom registered four declarations and reservations with regard to the application of the Covenant to Hong Kong. The first declaration stated that in any conflict between their obligations under article 1 of the Covenant and their obligations under the United Nations Charter, their obligations under the Charter shall prevail. Second, the United Kingdom reserved “the right to interpret article 6 as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment opportunities of workers in that region or territory.” Third, it postponed the application of the principle of equal remuneration, as articulated in Article 7(1)(a) to Hong Kong and other territories. Finally, the United Kingdom precluded the application to Hong Kong of Article 8(1)(b), regarding the right of trade unions to form federations or confederations.<sup>24</sup>

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<sup>23</sup> For example, Article 8 of the Basic Law provides that “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 contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.” Article 8 does not refer to Chinese national law.

<sup>24</sup> International Covenant on Economic, Social and Cultural Rights: Declarations and Reservations, United Nations, Treaty Series, vol. 993, p. 3.

It is unclear whether these declarations and reservations registered by the United Kingdom remain valid for Hong Kong, even after China's resumption of sovereignty over Hong Kong on 1 July 1997. In the "Letter of notification of treaties applicable to Hong Kong after 1 July 1997" deposited with the U.N. Secretary-General, the Chinese Government stated that "[t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997. The Government of the People's Republic of China has already carried out separately the formalities required for the application of the treaties . . . including the related amendments, protocols, reservations and declarations, to the Hong Kong Special Administrative Region with effect from 1 July 1997."

To date, China has not yet entered any reservations or declarations relevant to the application of the ICESCR.<sup>25</sup> The language in both the Letter to the U.N. Secretary-General and the Article 39 of the Basic Law emphasize that the Covenant "as applied to Hong Kong shall remain in force." It is feared that this language may be used to delay the withdrawal of the declarations and reservations to the Covenant entered by the United Kingdom in 1976 on behalf of Hong Kong.

As the Human Rights Committee has stated with regard to reservations to the International Covenant on Civil and Political Rights, "it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. . . . Reservations should be withdrawn at the earliest possible moment."<sup>26</sup> Human Rights Monitor believes that the same considerations should apply as well to reservations made to the International Covenant on Economic, Social and Cultural Rights. Reservations have been made to Articles 1, 6, 7 and 8 of the Covenant since 1976 without any explanation of the necessity for such reservations.

[Human Rights Monitor requests your Panel to urge the Hong Kong Government to](#)

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[http://www.un.org/Depts/Treaty/final/ts2/newfiles/part\\_boo/iv\\_boo/iv\\_3.html](http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html)

<sup>25</sup> China has only stated that "The signature that the Taiwan authorities affixed, by usurping the name of "China", to the [said Covenant] on 5 October 1967, is illegal and null and void." ICESCR: Declarations and Reservations. United Nations, Treaty Series, vol. 993, p. 3.

<sup>26</sup> Human Rights Committee, General Comment 24 (4 November 1994), at para. 20.



clarify the applicability of reservations to the Covenant entered by the United Kingdom and, if such reservations are deemed by the Governments to be valid, then your Panel should urge the Governments to withdraw such reservations at the earliest possible date. The Governments should also be requested to explain the why the reservations are necessary and to clarify the time by which the Governments will bring Hong Kong's laws and practices in conformity with the Covenant and will withdraw these reservations.

## ARTICLE 6

Article 6(1) of the Covenant provides for the right of everyone to the opportunity to gain his living by work one freely chooses or accepts. Unfortunately, the right to freely choose one's work is severely circumscribed in Hong Kong by discrimination against women and older people.

### 6.1 *Sex discrimination*

Despite the enactment of the Sex Discrimination Ordinance in 1995, women continue to face significant obstacles in securing employment. A recent study by the Hong Kong Polytechnic University concluded that the unemployment rate for women may be as high as 20%. The study criticized the Government's official unemployment rate of 6.1%, since this statistic failed to take into account the "invisible unemployed labour force" including housewives who wish to work and older people who were forced to retire early.<sup>27</sup> A study by the Federation of Trade Unions also revealed that women have borne the brunt of the economic crisis in Hong Kong. The Federation stated "the discriminatory perception that 'men should be breadwinners while women should stay at home' had led many female workers to lose their jobs."<sup>28</sup>

Since women remain the primary caretakers of children, the absence of adequate childcare facilities is an important factor hindering women from seeking or accepting employment. The Government should establishment childcare facilities with sufficient capacity to care for the children of all mothers who work or want to work. Moreover, the Government should ensure that the childcare facilities operate to accommodate working women by having operating hours that coincide with normal working hours.

The Government states that it provides employment training for women. One common criticism of these training programs, however, is that women are not trained in high-level or highly marketable skills. Thus, even if women may be able to find jobs in the short term, if an employer chooses to down-size, the women will be the first to be dismissed because of their lack of skills.

Human Rights Monitor request your Panel to urge the Government to monitor and

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<sup>27</sup> "Polytechnic University survey indicates unemployment rate as high as 21%" Ming Pao (22 July 1999).

<sup>28</sup> "Women 'suffering more' in downturn," South China Morning Post (21 July 1999).

investigate sex discrimination in employment. The Government should develop a comprehensive program to address all factors which may hinder women from entering the workforce, and should undertake such measures as providing adequate childcare facilities and appropriate job training.

## 6.2 *Age discrimination*

The Government claims in its Report that the unemployment rates for younger and older workers are comparable.<sup>29</sup> In fact, a 1999 joint study by American and Hong Kong scholars, supported by the Education and Manpower Branch of the Hong Kong Government, concluded that given the absence of laws prohibiting age discrimination, economic forces resulted in the lower hiring rates of older workers.<sup>30</sup> Moreover, a study of the attitudes of managers indicated that 50.4% of the managers had a preference for new hires under the age of 35, while 16.8% preferred new hires above age 35, and 32.8% indicated no preference.<sup>31</sup> Despite the Government's claim that there is no strong evidence of age discrimination, particularly against middle-aged women, NGOs and legislators who have worked to introduce legislation to prohibit age discrimination have received numerous complaints to the contrary.<sup>32</sup>

Rather than legislating against age discrimination, the Government states that it is addressing the issue by undertaking programmes of public education and self-regulation. For example, it points to the "Practical Guidelines for Employers On Eliminating Age Discrimination in Employment," issued by the Education and Manpower Bureau in February 1998. Unlike the codes aimed at addressing sex, disability, or family status discrimination (violations of which may be cited as

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<sup>29</sup> HKSAR Report, at para. 72-73.

<sup>30</sup> John S. Heywood, Lok-Sang Ho, and Xiangdong Wei, "The Determinants of Hiring Older Workers: Evidence from Hong Kong," 52 *Industrial and Labor Relations Review* 444 (Cornell University, April 1999).

<sup>31</sup> *Id.* at p. 455.

<sup>32</sup> "In March 1995, Anna Wu (sponsor of the Equal Opportunities Bill, which would have prohibited age discrimination had it been enacted) received over 2000 letters from women complaining of age discrimination." Carole Petersen and Anne Godfrey, Report of the Hong Kong Association of Business and Professional Women on the Initial Report on the Hong Kong Special Administrative Region under the Convention on the Elimination of All Forms of Discrimination Against Women. (November 1998), p. 7. An attachment to the report showed a number of job advertisements appearing in Hong Kong newspapers in November 1998, requesting job applicants to be within 25 – 35 years old.

evidence in legal proceedings), the Practical Guidelines have no enforcement power and are purely voluntary, to be followed or ignored at will. Since there are no legal prohibitions on age discrimination or penalties for engaging in this practice, the Practical Guidelines are unlikely to influence the behaviour of employers.

The Government also cites the fact that the Labour Department has only received one complaint of age discrimination, as if this figure were a meaningful indicator of the incidence of age discrimination in the workplace.<sup>33</sup> This statement demonstrates the Government's lack of touch with reality and indicates its efforts to mislead the UN Committee on Economic Social and Cultural Rights about the situation of discrimination in Hong Kong. Kenneth Kwok, a senior officer of the Equal Opportunities Commission, has stated "There are quite a number of such [age discrimination] cases, but I regret to say we can't help as they are beyond our control."<sup>34</sup> With the absence of legislation prohibiting age discrimination, it is hardly surprising that there are few individuals seeking non-existent remedies.

The Government's failure to take adequate measures to prohibit employment discrimination on the basis of age and gender violates the individual's right to freely choose his work, as guaranteed in Article 6(1) of the Covenant, as well as the Government's obligation to guarantee the enjoyment of rights without any discrimination, as required by Article 2(2) of the Covenant. Human Rights Monitor requests your Panel to urge the Government to implement legislation that will eliminate age discrimination and comprehensive equal opportunities legislation. For sex discrimination, where legislation alone has proven inadequate, the Government should be urged to consider additional measures to remedy ongoing de facto discrimination.

### 6.3 *Enforcement of Codes of Employment Practices*

The Government has issued non-binding codes of employment practices and guidelines aimed at eliminating employment discrimination. At present, there are four such documents: the Code of Practice on Employment under the Sex Discrimination Ordinance, the Code of Practice on Employment under the Disability Discrimination Ordinance, the Code of Practice on Employment under the Family Status Discrimination Ordinance, the Practical Guidelines for Employers On Elimination of Race Discrimination in Employment and the Practical Guidelines for

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<sup>33</sup> HKSAR Report, at p. 74.

<sup>34</sup> "Group powerless to fight every prejudice," The Hongkong Standard, 12 January 1999.

Employers On Eliminating Age Discrimination in Employment. Violations of the first three codes of practice may be cited as evidence in legal proceedings. The practical guidelines regarding race and age discrimination have no practical purpose at all since age discrimination is not prohibited by law.

Given the purely voluntary nature of the codes of employment practices in respect of age and race discrimination, it is likely that these guidelines will be ignored by employers. Human Rights Monitor believes that before laws are enacted to outlaw discrimination on the grounds of race and age, the Government should set an example by adopting the codes and guidelines and applying them to government employers. Moreover, the Government should condition the grant of government contracts upon the adoption of the codes and guidelines.

Human Rights Monitor requests your Panel to urge the Government to enhance the binding force of anti-discrimination codes of employment practices, and to immediately apply such codes to all government employers and government contractors.

#### 6.4 *Vocational training*

Article 6(2) of the Covenant obliges the Government to undertake “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment.” While the Government has implemented a number of training programs, for example, pursuant to the Employees Retraining Ordinance, attention must be paid to two areas in which further government effort is needed: discrimination in vocational training and lack of vocational training in prisons.

In January 1999, a newspaper reported that a number of pre-vocational schools only allow girls to take home economics and boys to take design and technology.<sup>35</sup> This type of gender stereotyping will reduce the number of available employment opportunities and channel girls into the lower-paying jobs after they graduate from vocational school. This practice not only affects the right of girls to vocational training but also violates the Government’s obligation to provide vocational training in a non-discriminatory manner. Human Rights Monitor requests your Panel to urge the Government to review the curricula and course selection requirements of vocational schools from a gender perspective, and to ensure that girls have an equal

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<sup>35</sup> “Schools accused of sex discrimination,” Ming Pao Daily (15 January 1999).

opportunity to receive training in the full range of courses offered by vocational schools.

In 1997, Human Rights Monitor and Human Rights Watch conducted an inspection of 22 prisons in Hong Kong. All convicted prisoners are obliged to work unless they are excused for medical or other reasons.<sup>36</sup> The Human Rights Watch/ Human Rights Monitor delegation observed that in some prisons, the goods produced required the prisoners to perform only simple and rote labour. For example, in one prison, inmates were required to twirl piles of cotton to produce cotton balls.<sup>37</sup> Human Rights Monitor believes that these types of labour will not prepare prisoners to seek employment upon their release. Human Rights Monitor requests your Panel to urge the Government to undertake vocational training programmes for prison inmates so that they may be equipped with meaningful skills and be qualified to seek employment upon their release.

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<sup>36</sup> Rule 28 of the Prison Rules.

<sup>37</sup> Hong Kong Prison Conditions in 1997, HRW/Asia and Hong Kong Human Rights Monitor (June 1997), at p. 38.

## ARTICLE 7

### 7.1 *Establishing a minimum wage*

According to Article 7(a) of the Covenant, the right to “just and favourable conditions of work” includes the right to fair wages which provide workers with a “decent standard for themselves and their families.”

The ILO has recommended that minimum wage fixing “should constitute one element in a policy designed to overcome poverty and to ensure the satisfaction of the needs of all workers and their families.”<sup>38</sup>

Despite the UN Committee on Economic Social and Cultural Rights’ recommendation that the Government review its policies regarding minimum wage,<sup>39</sup> the Government has continued to reject efforts to legislate a minimum wage. The Government asserts in its Report, “Hong Kong is a free market economy in which employers and employees freely negotiate the level of wages.”<sup>40</sup> In October 1998, the Education and Manpower Bureau also stated that it would be “inappropriate . . . to set up any form of minimum wage in Hong Kong. . . [A] market-driven wage mechanism in an efficient and responsive labour market is one of the factors underpinning the success of Hong Kong as a world-renowned free market economy. This is also crucial to ensuring that Hong Kong remains one of the world’s most attractive places to invest and to do business.”<sup>41</sup> In April 1999, the Legislative Council vetoed a proposal to establish a minimum wage. The Government, however, has long maintained a minimum wage for migrant domestic helpers.

The Government’s assertion that “employers and employees freely negotiate the level of wages” ignores the fact that employers and employees do not enjoy equal bargaining power, as recognized by other countries which have legislated minimum wage and other minimum standards for employment. The bargaining power of

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<sup>38</sup> Recommendation concerning minimum wage fixing, with special reference to developing countries. Recommendations No. 135 of International Labour Conventions, at para. 1.

<sup>39</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. E/C.12/1/Add.10 (6 December 1996), at para. 38.

<sup>40</sup> HKSAR Government Report, at para. 87(e).

<sup>41</sup> Education and Manpower Bureau, Administration’s Views on the “Proposal on minimum wage in Hong Kong” put forward by the Hong Kong Social Security Society (October 1998)

employees has been further reduced by the rise in unemployment rates since the economic downturn in Hong Kong. As noted by the Hong Kong Social Security Society, “the scarcity of jobs has led to very keen competition in the job market where a single vacancy often attracts many applications (usually over a hundred). Such being the case, employees are subjected to exploitation by employers in the form of reduced wages and benefits, longer working hours and increased workloads. Some enterprises have taken advantage of employees’ vulnerability by cutting down wage and manpower levels (the so-called down-sizing) even though they are still making handsome profits.”<sup>42</sup>

Studies of wages in Hong Kong indicate that current levels of earning have made it difficult for individuals to support their families. In 1997, the Hong Kong Social Security Society estimated that 14% of the population were below the poverty line, defined at HK\$2,500 per month.<sup>43</sup> An analysis of monthly employment earnings in the first quarters from 1993 – 1998 reveals that clerks, service workers, craft and related workers, and those engaged in elementary occupations suffered a negative growth in their wages and earned less than \$10,000 per month. Moreover, women comprised 75% of all individuals earning less than \$6,000 a month.<sup>44</sup>

With Hong Kong’s economic downturn, employers have abused the vulnerability of employees by forcing them to either accept a reduction of wages or be dismissed. Lack of adequate protection against unfair dismissal under the current Employment Ordinance enables employers to utilize this strategy without fear of serious punishment. This has led to the deterioration of the financial situation of employees as well as to criticisms of unfairness. Under public pressure the Government has agreed to take appropriate measures, but thus far it has only introduced a set of guidelines for wage reduction. The Government, however, has not even required its own bodies, such as the postal services, to adopt these guidelines as part of their

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<sup>42</sup> Hong Kong Social Security Society, A Research Paper on the Proposal for a Minimum Wage in Hong Kong” (October 1998)(hereinafter “Hong Kong Social Security Society Research Paper”), at para. 1.3.

<sup>43</sup> Shirley Kwok, “One in 7 survive on less than \$ 90 a day” South China Morning Post (8 September 1997). The Government does not provide an official figure for the poverty line. The Hong Kong Social Security Society defined the poverty line at half the median income. The organization stated that this formula was more conservative than that used by most Western countries, which drew the poverty line at half the average income, and that the actual percentage of people living in poverty in Hong Kong may be much higher.

<sup>44</sup> Hong Kong Social Security Society Research Paper, at para. 1.2, 1.4.



employment practices.

The failure of the Government to establish a minimum wage rate is contrary to the right of individuals to enjoy fair wages for their work. Human Rights Monitor requests your Panel to urge the Government to establish a minimum wage that would ensure a decent standard of living. The Government should also strengthen protections against unfair dismissal under the Employment Ordinance. Your Panel should also urge the Chinese government to extend ILO Convention on Minimum Wage Fixing (No. 131) to Hong Kong.<sup>45</sup>

## 7.2 *Minimum wage for foreign domestic helpers*

The Government indicated in its Report that a minimum wage has been established for foreign domestic helpers, set at HK\$ 3,860 a month. Furthermore, the Government asserts that “the minimum allowable wage is precisely that: a minimum. Employers can – and often do – pay more.”<sup>46</sup> This statement is patently untrue. While employers may be subject to imprisonment for up to one year if they pay below the minimum wage, there have been numerous reports that foreign domestic workers are frequently paid at almost half the minimum wage. In September 1998, a local newspaper reported that 8 out of 15 employment agencies contacted by a reporter posing as a prospective employer offered to provide domestic helpers who were willing to work at 22 – 35% below the minimum wage rate. However, a spokesperson for the Labour Department said that salary violations were outside of its jurisdiction.<sup>47</sup> In January 1999, the Immigration Department began investigating seven employment agencies accused of offering 3,000 Indonesian domestic helpers for as low as HK\$ 2,000 per month.<sup>48</sup>

In February 1999, the Government reduced the minimum wage by 5% (HK\$ 190) to

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<sup>45</sup> Although the Government states in its report that it has submitted to the ILO a report on the Minimum Wage-Fixing Convention, this Convention is not listed by the Education and Manpower Bureau among the 46 ILO Conventions which are applicable to Hong Kong. See Education and Manpower Bureau, “Information Paper on the Application of International Labour Conventions in the Hong Kong Special Administrative Region” (February 1999); Appendix: List of 46 International Labour Conventions applied in the Hong Kong Special Administrative Region.

<sup>46</sup> HKSAR Government Report, at para. 92.

<sup>47</sup> Cindy Sui, “Agents flout maids’ wage law,” South China Morning Post (29 September 1998).

<sup>48</sup> Cindy Sui, “Raid on agencies suspected of supplying discount maids,” South China Morning Post (8 January 1999).

HK\$ 3,670 a month, bringing the wages of domestic helpers even closer to the estimated poverty line of \$2,500 per month. The minimum wage has not been raised since. Non-governmental organisations have warned that the black market wages for domestic helpers will be further reduced as a result of the cut in the minimum wage.<sup>49</sup>

Human Rights Monitor requests your Panel to urge the Government to review the minimum wage for foreign domestic helpers and to ensure that they receive fair remuneration that will enable them to enjoy a decent standard of living. Your Panel should also demand that the Government vigorously investigate and prosecute all violations of minimum wage laws.

### 7.3 *Equal remuneration for work of equal value*

Article 7(a) of the Covenant establishes that the right to “just and favourable conditions of work” also includes the right to “equal remuneration for work of equal value.”

A 1995 study by the United Nations Development Programme ranked Hong Kong 38<sup>th</sup> out of 54 countries in terms of wage equity, with women earning an average 69.5 per cent of men’s wages.<sup>50</sup> The median wages for all employment sectors still reflect a wide gap between the salaries of men and women. For example, the median wage for unskilled female and male workers in 1997 was HK\$ 3,000 and HK\$ 8,000, respectively. The median wage for women and men in the managerial and administrative sector was HK\$ 25,000 and HK\$ 28,000, respectively.<sup>51</sup>

Although both China and the United Kingdom are parties to the ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Convention No. 100), this convention is not among the 46 ILO Conventions which are applicable to Hong Kong.<sup>52</sup> Article 2(2) of Convention No.

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<sup>49</sup> Cindy Sui, “Pay cut for maids on illegal rate,” *South China Morning Post* (5 February 1999).

<sup>50</sup> Jane Moir, “Women fare poorly in pay league table,” *South China Morning Post* (August 17, 1995).

<sup>51</sup> Lam Ying Hing, “Sex discrimination in the labour market – age discrimination, sexual harassment, the impact of the economic recession,” at p. 3-4. Paper submitted to the Seminar on Hong Kong and the Convention on the Elimination of All Forms of Discrimination Against Women, Centre for Comparative and Public Law and the Women’s Studies Research Centre, The University of Hong Kong (28 November 1998).

<sup>52</sup> See Education and Manpower Bureau, “Information Paper on the Application of International Labour Conventions in the Hong Kong Special Administrative Region” (February 1999); Appendix:

100 provides that ILO members shall implement the principle of equal remuneration by means of “national laws or regulations, legally established or recognised machinery for wage determination; collective agreements between employers and workers; or a combination of these various means.”

The Government claims that the principle of equal remuneration will be protected since the Sex Discrimination Ordinance outlaws sex discrimination in all areas of employment, including terms and conditions of work. The Court may refer to the Code of Practice on Employment under the Sex Discrimination Ordinance to determine whether the principle of equal pay for equal work has been violated.<sup>53</sup> The Code of Practice states that a female employee is entitled to equal pay for work that is the same, broadly similar, or of equal value to that of a man.<sup>54</sup>

Since the principle of equal pay for work of equal value is not explicitly in the Sex Discrimination Ordinance,<sup>55</sup> it may be difficult to rely on this law to make a claim for equal remuneration.

Human Rights Monitor requests your Panel to urge the Government to incorporate expressly and clearly the right to equal remuneration for equal work in the Sex Discrimination Ordinance, to establish a recognized mechanism for determining wages, and to provide for effective remedies when the right to equal remuneration has been abridged. Your Panel should also urge the Chinese Government to extend ILO Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Convention No. 100) to Hong Kong.

#### 7.4 *Eliminating sexual harassment in the workplace*

Article 7(b) of the Covenant establishes that the right to “just and favourable conditions of work” also includes the right to “[s]afe and healthy working conditions.” The right to safe working conditions also entails the right to be free from sexual harassment at work. In 1989, the Committee on the Elimination of Discrimination against Women stated that Article 11 of the Covenant on the

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List of 46 International Labour Conventions applied in the Hong Kong Special Administrative Region.

<sup>53</sup> HKSAR Government Report, at para. 81.

<sup>54</sup> Code of Practice on Employment under the Sex Discrimination Ordinance, paragraph 12.

<sup>55</sup> Section 11(2)(b) of the Sex Discrimination Ordinance provides that “It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to discriminate against her in the terms of employment he affords her.”

Elimination of Discrimination against Women, regarding the right to employment, requires states to protect women against violence of any kind in the workplace.<sup>56</sup>

In July 1999, the Equal Opportunities Commission announced that it had received 115 complaints of sex discrimination in the workplace during the first half of the 1999, compared with 71 in the same period last year. Among these complaints, 89 cases involved sexual harassment and other offences. This was also an increase from the 44 complaints of sexual harassment reported in the first half of 1998.<sup>57</sup>

The EOC has the discretion under the Sex Discrimination Ordinance to provide legal assistance, such as legal advice by EOC lawyers, to individuals who seek civil remedies for sexual harassment.<sup>58</sup>

According to the Sex Discrimination Ordinance, the EOC may initiate a civil action if an individual has alleged a specific act of discrimination but has declined to file a suit on his own behalf. If no individual has filed a complaint, the EOC may not bring a civil action even if it is aware of a discriminatory practice.<sup>59</sup> Non-governmental organizations have expressed concern that with the economic downturn and increasing employment rates, women may be more vulnerable to sexual harassment in the workplace and more reluctant to file complaints.<sup>60</sup> The EOC has called for an amendment to the Sex Discrimination Ordinance to enable it to “bring civil proceedings in the District Court for declaratory relief against respondents with discriminatory practices, without the need to base such proceedings on individual claims and without conducting a formal investigation.”<sup>61</sup> Given the vulnerability of women to dismissal in Hong Kong’s current economic downturn, empowering the EOC in this manner would be an important step in eliminating sexual harassment and other types of discrimination in the workplace.

Human Rights Monitor believes that the failure to eliminate sexual harassment in the

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<sup>56</sup> See Committee on the Elimination of Discrimination against Women, General Recommendation No. 12 (Eighth session, 1989).

<sup>57</sup> Felix Chan, “Action call over sex bias at work,” South China Morning Post (14 July 1999).

<sup>58</sup> Equal Opportunities Commission, Equal Opportunities Legislative Review: Proposals for Amendment of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance (February 1999)(hereinafter “Equal Opportunities Legislative Review”) at p. 15.

<sup>59</sup> Equal Opportunities Legislative Review, at p. 19.

<sup>60</sup> Felix Chan, “Action call over sex bias at work,” South China Morning Post (14 July 1999).

<sup>61</sup> Equal Opportunities Legislative Review, at p. 19.

workplace violates the right of women to safe working conditions and the obligation of the Government to ensure this right, without discrimination, as provided for in Article 2 of the Covenant. Human Rights Monitor requests that your Panel urge the Government to amend the Sex Discrimination Ordinance to empower the EOC to initiate civil suits against discriminatory practices, regardless of whether individual complaints have been filed with the EOC.

#### 7.5 *Right to weekly rest days*

Article 7(d) of the Covenant establishes that the right to “just and favourable conditions of work” also includes the right to rest and leisure. The Government states that Part IV of the Employment Ordinance entitles employees under a continuous contract to one rest day in every period of seven days.

The right of the employee to a weekly rest day is compromised by Sections 19 and 20 of the Employment Ordinance. Section 19(2) permits employers to require an employee to work on his rest day “if it is necessary to do so by reason of a breakdown of machinery or plant or other unforeseen emergency of any nature.” Section 20 permits “voluntary” work on rest days, if the employee or the employer so requests. Given the unequal balance of power between an employer and an employee, an employer’s request that an employee work on a rest day will be difficult to resist because there are insufficient legal protections in the Employment Ordinance. Furthermore, neither of these sections provides for overtime pay if the employee works on a rest day.

In reality, large sectors of workers do not enjoy their statutory rest day. The Asian Migrant Centre, which is preparing a class-action lawsuit against employment agencies, estimates that 90% of the 31,800 Indonesian domestic helpers in Hong Kong are denied their statutory days off.<sup>62</sup> Similarly, a survey of conducted by the HK Women Workers' Association found that 53.4 per cent of female cleaners for public housing estates in East Kowloon did not have regular days off.<sup>63</sup>

Human Rights Monitor requests your Panel to urge the Government to strengthen legal protections for the right to weekly rest days.

#### 7.6 *Two-week rule for foreign domestic helpers*

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<sup>62</sup> “Maids to sue cheating job agencies,” South China Morning Post ( 19 April 1999).

<sup>63</sup> “Poll says female cleaners miss out on annual leave,” South China Morning Post ( 29 June 1999).

In its review of the third periodic report in 1996, the UN Committee on Economic Social and Cultural Rights expressed disappointment over the Government's failure to rescind "two-week rule" imposed upon foreign domestic helpers. The rule requires foreign domestic workers to find employment or to leave Hong Kong within two weeks of the termination of their employment contract.

This rule clearly places foreign domestic workers in an extremely vulnerable position vis-à-vis their employers. The possibility of deportation would effectively prevent workers from reporting regarding violations of the minimum wage laws, sexual harassment, the denial of statutory rest days and holidays, or the infringement of other rights in the Covenant.

Furthermore, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No. 143) provides in Article 8(1) that "[o]n condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit. China has not yet ratified ILO Convention No. 143.

Human Rights Monitor requests your Panel to urge the Government to rescind the two-week rule for foreign domestic helpers. Your Panel should also call upon the Chinese Government to ratify ILO Convention No. 143 and to extend its application to Hong Kong immediately.

## ARTICLE 8

Article 8 of the Covenant addresses rights relating to the formation of and participation in trade unions. The Hong Kong Government's obligation to respect the right to organize trade unions also arises from the PRC's recognition of the applicability to Hong Kong of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)(hereinafter "Convention No. 87") and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)(hereinafter "Convention No. 98"). Article 39 of the Basic Law provides for the continued application of the ILO Conventions to Hong Kong.

Prior to the handover, a number of laws had been enacted to implement the rights guaranteed in the ILO Conventions to which Hong Kong is bound. After 1 July 1997, however, the Provisional Legislative Council quickly annulled these laws, resulting in a dramatic roll-back of labour rights. In November 1998, the Committee on Freedom of Association of the International Labour Organisation (hereinafter "ILO Committee") issued its report on allegations by the Hong Kong Confederation of Trade Unions (HKCTU) that the Hong Kong Government had violated Conventions No. 87 and 98.<sup>64</sup> The ILO Committee held that the Government had breached these conventions by repealing or amending legislation that had provided for the rights guaranteed therein.<sup>65</sup> The ILO Committee therefore recommended repeals of offending provisions in the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (hereinafter "ELRO"), which amended the Trade Union (Amendment) (No. 2) Ordinance, 1997 (hereinafter "Trade Union Ordinance").

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<sup>64</sup> International Labour Organisation, Committee on Freedom of Association, "Case No. 1942: Complaint against the Government of China/Hong Kong Special Administrative Region presented by the Hong Kong Confederation of Trade Unions (HKCTU)" (November 1998)(hereinafter "ILO Committee Report") [http://www.ilo.org/public/english/20gb/docs/gb273/gb-6-1.htm#Case No. 1942](http://www.ilo.org/public/english/20gb/docs/gb273/gb-6-1.htm#Case%20No.%201942). Although the ILO Committee Report addressed at length the government's violations of Convention No. 98, the right to collective bargaining is not explicitly within the ICESCR and will not be discussed here.

<sup>65</sup> On 26 June 1997 the Hong Kong Legislative Council passed three Ordinances: 1) Employees' Right to Representation, Consultation and Collective Bargaining Ordinance, 1997; 2) Employment (Amendment) (No. 4) Ordinance, 1997; and 3) Trade Union (Amendment) (No. 2) Ordinance, 1997. In September 1997, the HKSAR Executive Council resolved to repeal the first two Ordinances and to amend the third. On 29 October 1997, the Provisional Legislative Council approved the Employment and Labour Relations (Miscellaneous Amendments) Ordinance, 1997 (hereinafter "ELRO").

## 8.1 *Right to form trade unions*

Article 8(1)(a) of the Covenant provides for the “right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned.” Article 3 of Convention No. 87 further provides for the right of trade unions to “elect their representatives in full freedom” without any interference or restrictions from public authorities.

As amended by ELRO, Section 17(2) of the Trade Union Ordinance requires that an officer of a trade union be “engaged or employed in a trade, industry or occupation with which the trade union is directly concerned.”<sup>66</sup> Section 17(6) further provides that “Any person who is an officer of a registered trade union in contravention of this section shall be guilty of an offence and shall be liable on summary conviction to a fine of \$1000 and to imprisonment for 6 months.” The ILO Committee found that such restrictions were contrary to Convention No. 87 and stated

The determination of conditions of eligibility of union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organizations.”<sup>67</sup>

Accordingly, it requested the government to repeal the occupational requirement for trade union offices. To date, the Government has not adequately address the concerns of the ILO Committee in spite of its renewed effort to follow up the developments.

Human Rights Monitor requests your Panel to urge the Government to respect the right to form unions as provided for in Article 8 of the Covenant and Article 3 of Convention No. 87 and to our laws into line of the Convention and the ICESCR.

## 8.2 *Right to protection from anti-union discrimination*

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<sup>66</sup> The full text of Section 17(2) of the Trade Union Ordinance reads as follows: “No person shall, without the consent in writing of the Registrar, be an officer of a registered trade union unless he is ordinarily resident in Hong Kong and is or has been engaged or employed in a trade, industry or occupation with which the trade union is directly concerned.” The occupational requirement for trade union officers had been removed by the Trade Union (Amendment) (No. 2) Ordinance, 1997 but was re-introduced by ELRO.

<sup>67</sup> ILO Judgment at para. 63.



Inherent in the right to join trade unions, as provided for in Article 8(1) of the Covenant, is the right to protection from dismissals or other retaliatory measures motivated by anti-union discrimination. Article 1 of Convention No. 98 explicitly states that “[w]orkers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment [including protections against] acts calculated to. . . cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities.”

The Government claims that the Employment Ordinance protects employees from anti-union discrimination in two ways. First, employers who engage in anti-union discrimination may be subject to a criminal prosecution and a fine of up to HK\$ 100,000. Second, employees who are subject to dismissal due to their union activities may seek remedies such as reinstatement, re-engagement, terminal payments or compensation.<sup>68</sup>

While prosecution for anti-union discrimination by employers is theoretically possible under Section 21B of the Employment Ordinance, in practice, no prosecution has ever been successful. The reason for this has been explained by the Government itself. In its Review of Industrial Relations System in Hong Kong, 1993, the Education and Manpower Branch conceded that “although the Government has from time to time received complaints from employees against their employers for anti-union discrimination, there has yet to be a successful prosecution case. Past experience has shown that it is difficult to prove such violations, as often other reasons are used as cover-up for the hidden discriminatory motive.”<sup>69</sup> According to the Hong Kong Confederation of Trade Unions (“HKCTU”), there have only been two attempted prosecutions to date, one involving the dismissals by the New Bright Plastics Factory in 1988, and another involving a dismissed unionist at Wellcome Co. Ltd in 1994.<sup>70</sup> Moreover, HKCTU asserts that given the difficulties of establishing the employer’s intent to discriminate against union participants, the Government is frequently reluctant to initiate prosecutions.<sup>71</sup>

The government fails to provide effective remedies for individuals who are subject to anti-union discrimination. According to Sections 32M and 32N of the Employment

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<sup>68</sup> HKSAR Government Report, at para. 128 – 129.

<sup>69</sup> ILO Committee Report, at para. 243.

<sup>70</sup> ILO Committee Report, at para. 243.

<sup>71</sup> Interview with Lee Cheuk Yan, Chair, Hong Kong Confederation of Trade Unions, on 12 July 1999.

Ordinance, if a court or a Labour Tribunal determines that an employer has not shown a valid reason for a dismissal, it may issue an order for reinstatement or re-engagement. However, Section 32N(3) requires that the employer and employee must first express their mutual consent to such an order. As noted by the ILO Committee, “it is difficult to envisage that the requirement of prior mutual consent contained therein will be easily forthcoming if the true reason for dismissal is based on anti-union motives.”<sup>72</sup>

Notably, in countries such as the United Kingdom where an order for reinstatement or re-engagement is available as a remedy, the court issuing such an order may consider such factors as the complainant’s wish to be reinstated or the feasibility of the employer’s compliance with the order.<sup>73</sup> However, these countries do not permit the employer to block the award of appropriate remedies such as reinstatement or re-engagement by simply withhold consent. Accordingly, the ILO Committee also urged the Hong Kong Government to amend the Employment Ordinance so as to provide for the “the possibility of the right to reinstatement which would not be conditional upon the prior mutual consent of both the employer and the employee concerned.”<sup>74</sup>

Even in cases where the Labour Tribunal has not issued an order for reinstatement or re-engagement, the Government states the employee may at least be able to claim compensation of up to HK\$ 150,000. However, the ILO Committee has noted that compensation alone is an inadequate remedy. “In the Committee's view, it would not appear that sufficient protection against acts of anti-union discrimination, as set out in Convention No. 98, is granted by legislation in cases where employers can in practice, on condition that they pay the compensation prescribed by law for cases of unjustified dismissal, dismiss any worker, if the true reason is the worker's trade union membership or activities.”<sup>75</sup>

Finally, the Employment Ordinance does not offer any remedies for individuals who have subject to other forms of anti-union discrimination, aside from dismissal. The ILO Committee “remind[ed] the Government that protection against acts of anti-union discrimination should cover not only dismissal, but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are

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<sup>72</sup> ILO Committee Report, at para. 266.

<sup>73</sup> See Sections 113 – 115 of the Employment Rights Act of 1996.

<sup>74</sup> ILO Committee Report, at para. 267.

<sup>75</sup> ILO Committee Report, at para. 266.

prejudicial to the worker.” The ILO Committee urged the Government to amend the Employment Ordinance so as to provide for protection against all acts of anti-union discrimination.<sup>76</sup>

The paucity of effective legal protections against anti-union discrimination has resulted in the increasing boldness of employers to take actions against individuals who engage in union activities. In the first six months of 1999, at least three major cases of dismissals based on anti-union discrimination have been reported. In January 1999, Tang Sin-hing, a container driver employed at the Orient Overseas Container Line, stated that he was forced to resign because of his participation in a union established in May 1998.<sup>77</sup> On 23 February 1999, the Far East Hydrofoil Company dismissed 44 cabin attendants, a majority of whom were members of the Hong Kong & Macau Marine Passengers Transportation Service Employees Union, formally registered on 22 January, 1999. Some of the dismissed workers had been employed with the company for more than 18 years.<sup>78</sup> In June 1999, more than 80 workers of Seven Seas Chemical (Holdings), all union members, also claimed that they had been dismissed for their union activities.<sup>79</sup>

Human Rights Monitor requests your Panel to urge the Government to respect the right to join unions, as provided for in Article 8(1) of the Covenant, and the right to protection against anti-union discrimination as set forth in Article 1 of Convention No. 98. Specifically, the Government should provide effective protections against and remedies for anti-union discrimination, including 1) undertaking vigorous prosecutions of employers who take retaliatory measures against their employees, motivated by anti-union discrimination; 2) amending Section 32N of the Employment Ordinance to include the possibility of the right to reinstatement without the prior mutual consent of both the employer and the employee; and 3) amending the Employment Ordinance to provide remedies for a full range of anti-union

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<sup>76</sup> ILO Committee Report, at para. 267.

<sup>77</sup> Shirley Kwok, “Tung family firm accused of labour breaches,” South China Morning Post (29 January 1999). The Orient Overseas Container Line is owned by Hong Kong Chief Executive Tung Chee-Hwa and his family.

<sup>78</sup> “Unions Under Attack Amidst Economic Downturn,” Hong Kong Confederation of Trade Unions, Turning Point, No. 4, April 1999. “Sacked 44 plan to go on hunger strike,” Hong Kong Standard (1 March 1999).

<sup>79</sup> Interview with Lee Chuek –yan, general- secretary of the Hong Kong Confederation of Trade Unions, on 12 July 1999. “Felix Chan, “Dismissed workers cry foul,” South China Morning Post (16 June 1999).

discriminatory measures.

### 8.3 *Right of trade unions to function freely*

Article 8(1)(c) of the Covenant provides for the “right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.” Integral to the functioning of trade unions is decision-making on the use of union funds.

As amended by ELRO, Section 33(1)(j) of the Trade Unions Ordinance requires that any contribution or donation to foreign trade unions and organizations must be subject to the prior approval of the Chief Executive. Section 34 of the Trade Unions Ordinance further prohibits the use of union funds for any political purpose, aside from the elections for the functional constituencies.<sup>80</sup>

The ILO Committee found that these restrictions violated the freedom of association. It reiterated that “provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes are incompatible with the principles of freedom of association.”<sup>81</sup> With regard to the blanket prohibition on spending for political purposes, the ILO Committee noted that “provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association provided that trade unions do not engage in political activities in an abusive manner and go beyond their true functions by promoting essentially political interests. The [ILO] Committee considers that it would be difficult, if not impossible, for unions to engage in political activities in practice in the face of a legislatively imposed ban on the use of union funds for any political purpose.”<sup>82</sup>

Human Rights Monitor requests your Panel to urge the Government to respect the right of unions to function freely as provided for in Article 8 of the Covenant and to repeal Sections 33(1)(j) and 34 of the Trade Union Ordinance.

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<sup>80</sup> Restrictions on the use of union funds had been removed by the Trade Union (Amendment) (No. 2) Ordinance, 1997 but were re-introduced by ELRO.

<sup>81</sup> ILO Committee Report, at para. 264.

<sup>82</sup> ILO Committee Report, at para. 264.

## ARTICLE 9

Article 9 of the Covenant recognizes the “right of everyone to social security, including social insurance.”

### 9.1 *Childcare and the CSSA Scheme*

In December 1998, the Social Welfare Department released the “Report on Review of CSSA Scheme” (hereinafter “CSSA Review”) which examined the CSSA system and made “recommendations on how those on CSSA can be encouraged and helped to rejoining the workforce.”<sup>83</sup> The CSSA Review indicated that there was public concern about abuses of the CSSA system and a growing dependency of people of working age on CSSA benefits.

The CSSA Review listed among its policy directions the need to “ensure that resources are directed to help the truly needy . . . who cannot fend for themselves through no fault of their own [and] to rid the system of work disincentives so as to ensure that those who can work will work.”<sup>84</sup> By framing the solution in terms of removing *disincentives* emerging from the CSSA recipients’ reluctance to work, instead of removing the *obstacles* that prevent CSSA recipients from working, the Social Welfare Department put forth inappropriate recommendations that are clearly at odds with the needs of the CSSA recipients.

From December 1997 to February 1998, the Social Welfare Department conducted a study of 260 employable adults comparing the CSSA benefit and employment histories of unemployed single person cases, unemployed family cases, and single parent cases. The study further observed that single parents had the highest rates of receiving CSSA for more than six months, and the lowest rates of employment in the five years prior to the study.<sup>85</sup> The reason cited by 43% of the single parent participants for leaving their jobs was “childcare.”<sup>86</sup> The results of the study

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<sup>83</sup> Social Welfare Department, “Report on Review of CSSA Scheme”(hereinafter “CSSA Review”) (December 1998).

<sup>84</sup> CSSA Review, at para. 31.

<sup>85</sup> CSSA Review. Annex 10: Qualitative Study of CSSA Cases With Employable Adults, at para. 15, 17.

<sup>86</sup> CSSA Review. Annex 10, at para. 19. It is also significant to note that there were originally 312 adults targeted for this study. There were 52 individuals who opted not to participate in the study, citing “need to take care of family member” and “ill health.” *Id.* at para. 7.

confirmed anecdotal evidence widely reported in newspapers that single-parent CSSA recipients are willing to work but are often unable to do so because of lack of adequate childcare services.<sup>87</sup>

No where in the CSSA Review is there any mention of the need to augment childcare services in order to enable single parents, the group most dependent on CSSA benefits, to seek and accept employment. Indeed, the CSSA Review originally recommended that parents with children over the age of 12 should be required to work, a recommendation that was eventually dropped after strong pressure from NGOs and the general public. The Government noted that it would keep the old policy (of requiring single parent CSSA recipients to work only after their children reach the age of 15) on “compassionate grounds,” indicating that it had no understanding of the practical difficulties faced by single parents CSSA recipients.<sup>88</sup>

Furthermore, the CSSA Review recommended unemployed CSSA recipients be required to perform volunteer community services as a condition of receiving CSSA benefits. According to the CSSA Review, “[p]articipation in community work could also break the tedium of unemployment, improve the recipient’s self-esteem and confidence, and help the recipient develop a work habit and gain a better understanding of the community, paving the way for eventual paid employment.”<sup>89</sup> In commenting on the proposal, Raymond Ch’ien Kuo-fung, member of the Executive Council, stated: “If some recipients keep refusing jobs, they should take part in some community service.”<sup>90</sup> The Social Welfare Department has warned that “We will strictly enforce the existing policy whereby the SSFU will immediately terminate payment of CSSA to an unemployed recipient who does not comply with our rules without acceptable reasons, and these would now include the requirement to undertake community work.”<sup>91</sup>

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<sup>87</sup> Vivian Chiu, “Plans to cut CSSA have led to claims that the Government will save cash without helping people find work.” South China Morning Post (14 February 1999)(quoting Ms. Tang, a battered wife and single mother with four children: “We are not lazy, we want to work, but who will take care of our children? If we can’t help our children, who can?”)

<sup>88</sup> Health and Welfare Bureau, Legislative Council Brief: Review of the CSSA Scheme Final Package of Proposals (February 1999), at para. 12.

<sup>89</sup> CSSA Review, at para. 39.

<sup>90</sup> Chris Yeung and Cynthia Wan, “Jobless face voluntary work to keep welfare cash,” South China Morning Post (9 December 1998).

<sup>91</sup> CSSA Review, at para. 46.

Again, the Government demonstrated its ignorance of the real reasons for the unemployment of single parents CSSA recipients, blaming it on their lack of self-esteem, confidence, and work habits -- and even on their rejection of abundant job opportunities! By imposing a volunteer service requirement, the Government is creating new difficulties for single parents who are already unable to find childcare services.

Human Rights Monitor requests that your Panel urge the Government to reform its CSSA Scheme with due consideration for the difficulties faced by single parents CSSA recipients. The Government should consider measures to improve the access of single parent CSSA recipients to adequate childcare, so that they may be free to seek and accept employment. Moreover, the Government should review the impact that the new requirement of community service will have on single parent CSSA recipients and provide for the exemption of such individuals from this requirement, where appropriate.

## 9.2 *Asset limits of the CSSA Scheme*

Applicants for CSSA may not be eligible to receive benefits if their total assets exceed established limits. The Government previously permitted a single recipient to have assets of up to \$37,000 and a family of four to have assets of \$93,000, and a family of six to have assets of \$130,000. Following the CSSA Review, however, the Government drastically slashed the assets levels in the following manner:

Size	Previous Asset Limit	Current Asset Limit	Percentage Decrease
1	HK\$ 37,000	HK\$ 24,000	-35%
4	HK\$ 93,000	HK\$ 64,000	-31%
6	HK\$ 130,000	HK\$ 64,000	-51%

The Government did not explain why a drastic reduction in the assets level was necessary. After laying out the scheme, the Government simply stated: “The proposal should have little impact on existing cases as most recipients do not have significant savings. It is not possible to assess their impact on potential applicants as there is no information on the level of assets held by people in Hong Kong.”<sup>92</sup>

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<sup>92</sup> CSSA Review, at para. 64.

Even more crippling is a new arrangement that owner-occupied residential property will now be considered when determining the assets of able-bodied CSSA applicants below the age of 50. The Social Welfare Department acknowledged that it would be “counter-productive to insist that those who are genuinely unable to support themselves sell their properties because it would cost the Government more in the long run when these people apply for housing assistance or for a rent allowance under CSSA to meet the cost of accommodation.”<sup>93</sup>

Nevertheless, the Government justified its decision to include residential property in assets assessments on the “rationale . . . that employable adults of a comparatively younger age are people with the potential to support themselves and their dependants, and *it is not unreasonable to expect them to run down their assets*, including self-occupied property, to a modest level before turning to welfare assistance.”<sup>94</sup>

It is estimated that 2,000 families face having to sell their homes or else they will lose their welfare payments. In February 1999, Director of Social Welfare Andrew Keung Kin-pong stated: “For those who have properties, I hope they sell them within the one-year grace period and sustain themselves with money from the sale.”<sup>95</sup>

Compelling welfare recipients to sell their own homes is contrary the Government’s own policy of increasing home ownership rates to 70% by the year 2007.<sup>96</sup> Moreover, as the Government explains in its report, applicants for public rental housing “must not have owned any private domestic property within two years preceding application.”<sup>97</sup> Thus, once the individuals sell their property, proceeds from the property sales will be quickly spent on renting housing units at market value. It is likely that, as expected by the Government, individuals will “run down their assets” and soon turn again to welfare assistance, in greater need than ever before given the added burden of paying rents at market value. It is unclear how such a result can be either more efficient or equitable or in any way desirable, from the point of view of either the Government or the individual.

The new asset limits and the inclusion of owner-occupied residential property in asset

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<sup>93</sup> CSSA Review, at para. 66.

<sup>94</sup> CSSA Review, at para. 67 (emphasis added).

<sup>95</sup> Cynthia Wan, “Homeowners on benefits face deadline,” South China Morning Post (25 February 1999).

<sup>96</sup> HKSAR Government Report, at para. 346.

<sup>97</sup> HKSAR Government Report at para. 355.



assessment will make it harder for individuals who are in need to obtain assistance from the CSSA scheme and will place them in a situation of greater financial insecurity. The Government has not provided any justification for these draconian measures. Moreover, by essentially forcing people to sell their homes as a condition of receiving CSSA benefits, the Government violates not only their right to social insurance under Article 9, but also the right to adequate housing, under Article 11 of the Covenant.

Human Rights Monitor requests your Panel to call upon the Government to restore CSSA asset eligibility levels to their original levels and to exempt owner-occupied residential property from consideration in asset assessments.

### 9.3 *Reduction of CSSA benefits*

The Government claims that “standard rates are revised annually to take account of inflation [and] we have regularly increased the value of payments in real terms to enable recipients to share in Hong Kong’s growing wealth.”<sup>98</sup>

In fact, in February 1999 the Government approved a reduction in CSSA by 10% for households comprising three able-bodied adults and children and by 20% for households comprising more than three able-bodied adults/children.<sup>99</sup>

The Government admits in its own Report that the average monthly CSSA for a single person in 1997 – 1998 only constituted 32% of the median wage.<sup>100</sup> It is important to remember, however, that the unofficial poverty rate is set at half of the median wage.<sup>101</sup> Thus, it is hard to see how the CSSA payments would be sufficient to meet its stated goal of “help[ing] the financially vulnerable meet their essential needs.”<sup>102</sup> With recent cuts in the CSSA benefits, recipients will slip further below the poverty line.

Moreover, in June 1999, the Social Welfare Department announced that it would freeze CSSA payments altogether because previous payments had been based on an overestimation of inflation. The proposed freeze would be in place until the

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<sup>98</sup> HKSAR Government Report, at para. 145 – 147.

<sup>99</sup> CSSA Review, at para. 49.

<sup>100</sup> HKSAR Government Report, at 160.

<sup>101</sup> Hong Kong Social Security Society, Poverty Watch (1998), at p. 1.

<sup>102</sup> HKSAR Government Report, at 160.

Government recouped its overpayment of \$ 700 million.<sup>103</sup> As of the writing of this report, the proposed freeze had not yet been approved by the Legislative Council.

Human Rights Monitor requests your Panel to urge the Government to reject efforts to freeze CSSA benefits, to restore CSSA payments to their original levels, and to examine increasing the level of CSSA benefits so that individuals can survive above the poverty line.

#### 9.4 *Deficiencies in the Mandatory Provident Fund*

The UN Committee on Economic Social and Cultural Rights has interpreted Article 9 to require the establishment of “general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law.”<sup>104</sup> This obligation has also been echoed in two ILO Conventions, Convention No. 102 concerning Social Security (Minimum Standards) (1952) and Convention No. 128 concerning Invalidity, Old-Age and Survivors' Benefits (1967).<sup>105</sup>

The Committee has further stated that ensuring the equal right of men and women to social insurance, as provided for under Article 3, means that Governments should “should pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations [and] should institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources on attaining an age specified in national legislation.”<sup>106</sup>

According to the Hong Kong Social Security Society, almost one-quarter (24.7%) of Hong Kong's elderly population live in poverty. Elderly people over the age of 75 have the highest proportion in poverty; approximately 30% of those over age 75 are considered poor, as compared with 20% of those between the age of 60 and 75. From 1991 to 1997, the number of elderly people receiving CSSA increased from 50,000 to 110,000.<sup>107</sup>

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<sup>103</sup> Rhonda Lam Wan, “Welfare de-linking ‘a test of endurance’” South China Morning Post (15 June 1999).

<sup>104</sup> Committee on Economic, Social and Cultural Rights, General Comment 6, at para. 27.

<sup>105</sup> Neither convention has been ratified by China.

<sup>106</sup> General Comment 6, at para. 21.

<sup>107</sup> Hong Kong Social Security Society, Poverty Watch (1998), at p.4.

As indicated by the Government in its Report, in 1995, the Government enacted the Mandatory Provident Fund Scheme Ordinance requiring employers and employees to contribute to private trust schemes so that upon retirement individuals may receive benefits corresponding to the contributions they made during their working years. As noted by the Hong Kong Social Security Society, however, the Mandatory Provident Fund “take another 30 years before it will yield any real effects.”<sup>108</sup> The Government must implement an interim plan to address the needs of the elderly people living in poverty in the decades before the Mandatory Provident Fund becomes financially viable.

Another major criticism of the Mandatory Provident Fund is that it does not extend to women who are homemakers and do not participate in the workforce. Since these women do not receive remuneration for their work and do not have an “employer”, no contributions to the Mandatory Provident Fund are made on their behalf. The failure of the Government to devise an old-age benefits scheme that will cover all women in their old age is contrary to Article 9 of the Covenant, as understood by the Committee in General Comment 6. Also unprotected by the Mandatory Provident Fund are those who are currently unemployed, who will only sink deeper into poverty in their old age.

Although the Government acknowledges these criticisms of the Mandatory Provident Fund, it dismisses them by simply saying that the “Government does not accept this assessment for the reasons adduced in paragraphs 192 and 193 above.”<sup>109</sup> However, paragraphs 192 and 193 are inapposite here, since they only describe how the Mandatory Provident Fund will work, but do not provide any justification for the exclusion of today’s elderly, homemakers, and the unemployed from the fund’s coverage.

Human Rights Monitor requests your Panel to urge the Government to develop an old-age benefits scheme that will provide benefits to those sectors of Hong Kong’s population who are currently excluded from the coverage of the Mandatory Provident Fund, including today’s elderly, homemakers, and the unemployed.

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<sup>108</sup> Hong Kong Social Security Society, *Poverty Watch* (1998), at p.4.

<sup>109</sup> HKSAR Government Report at para. 195 – 196.

## ARTICLE 10

Article 10(1) of the Covenant provides that “[t]he widest possible protection and assistance should be accorded to the family.”

### *10.1 Split families and the right of abode*

The UN Committee on Economic Social and Cultural Rights has previously expressed its “deep concern over the growing numbers of split families in Hong Kong.”<sup>110</sup> Although Article 24 of the Basic Law clearly provides for the right of abode in Hong Kong for children of permanent residents of Hong Kong, this right has not been honoured by the Government which established a one-way permit system and amended the immigration ordinance. With continuing uncertainty over the right of abode for children who have been adopted or children who were born before their parents became permanent residents, the number of families split between Hong Kong and China is increasing. Exacerbating the problem has been the Government’s refusal to implement a 29 January 1999 decision in which the Court of Final Appeal recognized the right of abode for children whose parents had not yet acquired residency status at the time of their birth. On 20 May 99, the Government requested the Standing Committee of the National People’s Congress to give an “interpretation” of the Basic Law; the interpretation, issued on 26 June essentially overturned the ruling by the Court of Final Appeal. A lot of those affected are no longer eligible to apply to come to and reside in Hong Kong to join their family as they do not fall within any eligible category.

While the Government maintains that the daily quota permitting 150 immigrants to enter Hong Kong was “designed to ensure a rate of settlement that our resources could reasonably absorb,”<sup>111</sup> this figure was criticised by the Committee on the Rights of the Child as “manifestly insufficient to meet the needs of the estimated 60,000 children currently in China who may have the right of abode in Hong Kong.”<sup>112</sup> Over 5,000 migrants are awaiting the Court of Final Appeal to rule on their claims to the right of abode and on the legal effect of the Standing Committee’s interpretation of the Basic

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<sup>110</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland (Hong Kong), U.N. Doc. E/C.12/1/Add.10 (6 December 1996), at para. 26.

<sup>111</sup> HKSAR Government Report, at para. 205.

<sup>112</sup> Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland - Hong Kong, 30/10/96. CRC/C/15/Add.63, at para. 14.

Law.<sup>113</sup>

Human Rights Monitor requests your Panel to urge the Government to implement the right of abode as provided for in the Basic Law and in a manner consistent with its obligations under Article 10(1) of the Covenant.

### 10.2 *Split families and the right of abode of expatriates*

Although the eligibility requirements for the ordinary residence are similar if not identical in the Basic Law, the Hong Kong Government has amended the Immigration Ordinance to provide for very different requirements in the name of implementing the Basic Law. The effect is that non-Chinese expatriates will be less likely to get the status of permanent resident in Hong Kong and lead to split families.

Article 24 of the Basic Law provides, inter alia,

"(2) The permanent residents of the Hong Kong Special Administrative Region shall be:

...

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

...

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

The Court of Appeal gave its judgment in the case of Fateh Muhammad V. Commissioner for Registration on 20 April 2000 which has highlighted the worst possible effect of the Government's discriminatory provisions in the Immigration Ordinance. We are also concerned that the Basic Law has, yet again, been restrictively interpreted so that an expatriate, like Fateh Muhammad, who is the respondent to the case and who obviously made Hong Kong his home, cannot get permanent residence status in Hong Kong on account of him spending a short time in prison.

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<sup>113</sup> Numbers in abode case pass 5,000" South China Morning Post (20 July 1999).

Fateh Muhammad is a Pakistani who has lived in Hong Kong for the last 35 years or so. He has a family in Hong Kong. He has paid taxes and contributed to society. Unfortunately, he is a non-Chinese expatriate and was convicted of a criminal offence and served a prison sentence.

The court has said that the restrictions imposed in the Immigration Ordinance are constitutional in spite of the fact that such restrictions do not appear in Article 24 of the Basic Law.

Such restrictions include, among others, that

(A) All expatriates (i.e. non-Chinese) have been ordinarily resident in Hong Kong for "a continuous period of 7 years . . . immediately before" his application for the status of Hong Kong permanent resident [Para. (1)(4)(b) of Sch. 1 to the Immigration Ordinance]; and

(B) A person shall not be treated as ordinarily resident in Hong Kong during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court [Section 2(4)(b) of the Immigration Ordinance].

Such an interpretation does not, on the face of it, seem to be consistent with the generous and purposive approach in the interpretation of the Basic Law as adopted by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* which judgment was delivered on 29 January 1999. In that judgment, the CFA has been extremely reluctant to accept restrictions that were not found in the Basic Law. A constitutional right should not be easily taken away by a restrictive interpretation of a provision meant to confer rights.

We are also concerned that a non-Chinese resident who, for any reason is sentenced to a term of imprisonment will have his or her residence broken by serving a prison sentence. This could occur if the person were later bailed for the alleged offence and later acquitted. The rule seems to impact on the presumption of innocence which holds that no one is liable to conviction (and, hence, imprisonment), unless their guilt is proved beyond reasonable doubt. It would be grotesque if a person was detained for two or three days by order of a court before being granted bail and the detainee was later acquitted but his application for permanent resident status was denied because of such temporary detention.

If section 2(4)(b) of the Immigration Ordinance was constitutional, the period of imprisonment should have only been discounted rather than taking it as a break of the period of ordinance residence for the purpose of application for the status of permanent resident.

Human Rights Monitor asks your Panel to question the Government on its discriminatory immigration legislation, to express similar concerns and to urge the Government to amend the laws immediately to repeal the discriminatory elements in the Immigration Ordinance and to ensure that imprisonment or detention by a court order does not unjustly break the ordinance residence in Hong Kong.

### 10.3 *Maternity protection*

Article 10(2) of the Covenant provides that “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.” Protection of maternity also includes prohibiting the termination of employment on grounds of pregnancy.

The Government asserts in paragraph 241 of its report that employers who dismiss workers because they are pregnant may face a fine of up to HK\$ 100,000. However, violations of maternity protections in the Employment Ordinance and Sex Discrimination Ordinance may be more difficult to establish where the employer dismisses a worker for fabricated reasons or makes the conditions of work so unpleasant that the worker is forced to resign.<sup>114</sup>

Even in cases where dismissal on the basis of pregnancy is apparent, conciliation by the EOC may result in inadequate remedies and the failure to prosecute the offending employees. For example, the EOC reports that in one case where a multi-national company fired a pregnant receptionist, the complainant asked for damages and a written apology. Following conciliation by the EOC, however, the complainant only received a “a reference letter from the respondent as final settlement of her complaint.”<sup>115</sup> Given Hong Kong’s economic downturn, women who have been

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<sup>114</sup> See “Fallout from motherhood,” South China Morning Post (23 September 1996)(describing how an employer circulating a memo forbidding colleagues to talk to a pregnant employee and forcing her to ask for permission before going to the toilet). Case 2, EOC News, Issue No.10 (04/99)(describing how an employee was demoted after returning from maternity leave).

<sup>115</sup> Case 1, EOC News, Issue No.5 (01/98).

dismissed because of pregnancy may opt for monetary settlements and the option of a favorable reference letter instead of pursuing legal action. The decisions of individual employees to accept settlements, monetary or otherwise, in order to resolve claims of pregnancy discrimination should not affect the Government's separate commitment to prosecute employers who violate the protections of the Employment Ordinance.

Human Rights Monitor requests your Panel to urge the Government to vigorously investigate and pursue all violations of maternity protections guaranteed in the Employment Ordinance.

#### *10.4 Denial of maternity protection to foreign domestic helpers.*

In June 1999, the Labour Department introduced a proposal that would “allow some flexible arrangements in the maternity provisions in respect of live-in [domestic helpers] to the effect that a pregnant live-in [domestic helper] and her employer may mutually agree to terminate their employment contract whereby the employer will have to pay the [domestic helper] a specified amount as detailed in the Annex.”<sup>116</sup> The amount of severance pay would depend on the length of time that the domestic helper had been employed. Once the employer paid the severance pay, he would no longer be liable for a claim of compensation for unlawful dismissal or for criminal penalties under the Employment Ordinance. The Legislative Council is scheduled to discuss the proposal in September 1999.

As numerous migrants rights groups have pointed out, it is unlikely that a termination of an employment contract would be “mutually agreed upon” given the unequal power relationship between the employer and the domestic helper. The proposal also does not specify the format of such agreement, whether it needs to be in writing or simply oral. If approved, the Labour Department's proposal would be easily subject to abuse by employers, who will be permitted under the Employment Ordinance to arbitrarily terminate pregnant domestic helpers. Furthermore, since live-in domestic helpers are disproportionately foreign workers, the denial of maternity protections would violate the Government's obligations under Article 2(3) to “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, [or] national or social origin.”

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<sup>116</sup> Labour Department, Report of the Applicability of the Employment Ordinance to Live-in Domestic Helpers (June 1999).



Finally, the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO Convention No. 143) provides in Article 10 that Governments should “declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.” China has not yet ratified ILO Convention No. 143.

Human Rights Monitor requests your Panel to urge the Government to ensure the full and equal application of maternity protections in the Employment Ordinance to live-in domestic helpers. Your Panel should also call upon the Chinese Government to ratify ILO Convention No. 143 and to extend its application to Hong Kong immediately.

#### *10.5 Child abuse and child neglect*

Article 10(3) of the Covenant states that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.” An integral part of the protection of children includes the elimination of child abuse and child neglect. The UN Committee on Economic Social and Cultural Rights has previously expressed concern over Hong Kong’s “absence of a holistic child policy for the protection of children from all forms of abuse.”

The number of cases of child abuse and child sexual abuse has increased dramatically in recent years. In 1990, 429 cases of child abuse were reported, of which 11 cases (2%) were child sexual abuse. In 1997, the number of reported child abuse cases nearly doubled to 815 cases while the number of child sexual abuse cases increased by over twenty-fold to 242 cases (30% of all child abuses cases). Furthermore, 80% of the child sexual abuse victims were girls.<sup>117</sup> Another disturbing trend has been the commission of child sexual abuse by children themselves. According to *Against Child Abuse*, one out of eight alleged offenders were boys under the age of 16.<sup>118</sup>

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<sup>117</sup> Priscilla Lui, Director, *Against Child Abuse*. “Violence against women and girls.” Paper for Seminar on Hong Kong and the Convention on the Elimination of All Forms of Discrimination Against Women (28 November 1998), at p.2.

<sup>118</sup> Kai Peter Yu, “22-fold rise in reported sexual abuse of young ‘tip of iceberg’” *South China Morning*

Also regrettable is social reluctance to report cases of child abuse to the appropriate authorities. Studies have indicated that people less willing than ever to report cases of child abuse because they consider it to be a “family matter.”<sup>119</sup> According to *Against Child Abuse*, victims and families are often discouraged from seeking help “for fear of splitting families and jailing abusers who are often family members or acquaintances.”<sup>120</sup> At the same time, the Government has rejected calls to adopt a mandatory child abuse reporting law on the grounds that in the United States, where such laws are in force the “success rate is not very high compared with the resources invested in verifying many cases which may not have evidence to back them up.”<sup>121</sup> Even professionals, such as social workers, do not have an obligation to refer cases of abuse to appropriate authorities. In one reported incident, a 16 year old girl told her school social worker that she had been repeatedly sexual assaulted by her older brother and was merely advised to “resist him.” The social worker never reported her case to the police, and it took three years before the girl went to the police herself.<sup>122</sup>

In addition to deliberate child abuse, children also suffer injuries as a result of being left unattended at home. In 1996, the Coroner’s Report indicated two accidental deaths of unattended children; in 1998, there were 16 such cases.<sup>123</sup> According to a study conducted by the Census and Statistics Department, 110,000 children aged 12 and below had been left unattended during the one-week survey period. Reasons for leaving children unattended include going to the supermarket (59%), going to work (28%) and “leisure shopping” (2%). Almost 95% of the parents had left their children unattended because they believed the duration of time had been short, because they were unaware of existing childcare services, or because an older sibling had been present.<sup>124</sup>

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Post (2 June 1999).

<sup>119</sup> Naomi Lee, “Crackdown on soaring abuse cases.” South China Morning Post (21 September 1997).

<sup>120</sup> Priscilla Lui, Director, *Against Child Abuse*. “Violence against women and girls,” at p.3.

<sup>121</sup> Cynthia Wan, “Campaign for child abuse hotline,” South China Morning Post (13 December 1998).

<sup>122</sup> Cliff Buddle, “Sexual abuse victim told to ‘resist’ attacks,” South China Morning Post (18 May 1996).

<sup>123</sup> Hong Kong Coroner’s Report (1996), at p. 74. Hong Kong Coroner’s Report (1998), at p. 75.

<sup>124</sup> Special Report No. 17: “Findings of the special topic enquiries conducted during April - June 97, including enquiries related to leaving children aged 12 and below unattended at home and keeping of cats and dogs in households.” Census and Statistics Department, HKSAR. (cited in Priscilla Lui, Director, *Against Child Abuse*. “Violence against women and girls,” at p.8.)

Human Rights Monitor requests your Panel to urge the Government to rigorously pursue prosecutions of child abuse and child neglect, to provide public education encouraging the reporting of child abuse, and to consider adopting appropriate legislation which would impose a duty to report child abuse upon, inter alia, medical professionals and social workers. The Government should also monitor the continuing problem of child neglect and commit more resources to public education and to the provision of childcare services.

## ARTICLE 11

Article 11 of the Covenant provides for the right to adequate housing. The UN Committee on Economic Social and Cultural Rights has stated in General Comment 4, that “adequacy” must take into consideration factors such as legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location, and cultural adequacy.<sup>125</sup>

### *11.1 Cage homes*

The continued existence of cage homes, which the Government refers to as “bedspace apartments” is the greatest shame of Hong Kong. In 1996, the UN Committee on Economic Social and Cultural Rights observed that the “phenomenon of sub-human cage-homes remains a blight in the housing situation in Hong Kong” and reiterated “in the strongest possible term its recommendation that the Hong Kong Government should undertake as a matter of high priority the total eradication of cage-homes”<sup>126</sup>

Despite the Committee’s unequivocal condemnation of cage-homes, the Government has failed to take adequate steps to close down all cage-homes and to make alternative arrangements for housing individuals who will be displaced as a result. Indeed, the Government continues to make excuses for its inaction, claiming that “there is a residual demand for low cost accommodation in convenient, core urban locations. This is demonstrated by the reluctance of many bedspace apartment lodgers to accept better alternative accommodation outside these areas. Therefore, we maintain that it would be wrong to outlaw this kind of accommodation.”<sup>127</sup>

The Government states that “[a]s of 30 June 1998, there were 101 [cage-homes] housing about 2,300 persons.”<sup>128</sup> However, social workers and non-governmental organizations believe there are at least 10,000 people living in cage-homes.<sup>129</sup> The Secretary for Home Affairs David Lan Hong-tung has admitted that it would be impossible to identify all cage-homes in Hong Kong because door-to-door checks

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<sup>125</sup> Committee on Economic, Social and Cultural Rights. General Comment No. 4 (1991), at para. 8.

<sup>126</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights (6 December 1996), at para. 14 and 40.

<sup>127</sup> HKSAR Government Report, at para. 388.

<sup>128</sup> HKSAR Government Report, at para. 386.

<sup>129</sup> Alex Lo, “Plea to Tung on plight of 10,000 cage-dwellers,” South China Morning Post (21 September 1998).

would create a public nuisance.<sup>130</sup>

The Government notes in its Report that there are currently hostels with less than 1,000 spaces for displaced cage-home lodgers.<sup>131</sup> The higher rents at the government hostels may not make this option a viable one. Even for individuals who are able to afford the government hostels, there are allegations that the hostels unduly restrict the rights of lodgers by imposing a ban on visits by friends and relatives except in designated areas, unannounced checks and room searches by hostel staff, and requiring health checks.<sup>132</sup> Finally, the demand for viable alternatives to cage-homes has simply outpaced the supply. In March 1999, the Society for the Rehabilitation of Offenders stated that each month, 80 to 100 discharged prisoners requested housing assistance; moreover, approximately 10,000 prisoners are discharged each year.<sup>133</sup>

Human Rights Monitor requests your Panel to demand that the Government eradicate cage-homes and formulate a comprehensive plan for re-housing lodgers who will be displaced once the cage-homes are shut down, as well as potential lodgers who will also be seeking new housing alternatives. Finally, the Government should establish a hotline, so that individuals may provide the Government with information about cage-homes operating in their neighborhood.

## *11.2 Restrictions on Public Rental Housing Tenancy*

The UN Committee on Economic Social and Cultural Rights has noted that Governments “must give due priority to those social groups living in unfavourable conditions by giving them particular consideration.” Despite the financial difficulties faced by the elderly and mainland immigrants, the Government has adopted housing policies that severely impact on their right to adequate housing.

According to a study conducted by Deloitte and Touche Consulting Group on behalf of the Government’s Working Group on Care for the Elderly, 94% of the primary caregivers surveyed are family members of the elderly.<sup>134</sup> The Government claims in

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<sup>130</sup> Rhonda Lam Wan, “Survey finds more cage homes than appear in official register” South China Morning Post (30 November 1998).

<sup>131</sup> HKSAR Government Report, at para. 392.

<sup>132</sup> Alex Lo, “Rules too tough at top hostel, claim former cagemen,” South China Morning Post (15 March 1999)

<sup>133</sup> Cynthia Wan, “Ex-prisoners join homeless,” South China Morning Post (15 March 1999).

<sup>134</sup> Health and Welfare Bureau, Legislative Council Penal On Social Services: Consultancy study on Needs of Elderly in Hong Kong for Community Support and Residential Care Services (September

its Report that it “encourages families to live with – and take care of – their elderly members. This is because we believe older persons are happiest living in their own homes in the company of their families and that their families are best placed to care for them.”<sup>135</sup>

However, if elderly persons are living in public rental housing, their children may not live with them unless they are already authorized to accept public housing. While it may take an elderly person three years to get off a waiting list for public housing, those under 60 may have to wait for up to seven years. In January 1999, it was reported that 60 out of 1,3000 homes occupied by the elderly were found in breach of these rules because the tenants had unregistered family members staying with them to take care of them. As a result, the elderly tenants faced eviction.<sup>136</sup>

According to the Housing Department, “[r]equests from elderly tenants for addition of children aged over 18 may be considered and approved only on exceptional grounds and individual merits, taking into account the justifications given and the circumstances of the elderly tenant such as health, economic and social conditions, the genuine dependence of the elderly tenant on the person-to-be added or vice versa and the occupancy position of the flat etc.”

It is troubling that the Housing Department should only grant such permission in “exceptional” circumstances, given the Government’s stated policy of having the elderly people live with their families, and given the Government’s obligation under Article 10 of the Covenant to protect the family. For example, in General Comment 6, the UN Committee on Economic Social and Cultural Rights has noted that Recommendation 29 of the Vienna International Plan of Action on Aging encourages Governments “to implement measures especially for low-income families who wish to keep elderly people at home.” Human Rights Monitor believes that elderly public housing tenants should be able to invite their adult children to live with them unless there are exceptional circumstances to show that such an arrangement is used to circumvent the normal waiting queues and to abuse the public rental housing scheme.

With regard to immigrants from the mainland, they must have at least seven years’ residence in Hong Kong before they may apply for public rental housing. The Government admits that “[w]here applicants have families, more than 50% of family

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1998), at para. 11.

<sup>135</sup> HKSAR Government Report, at 378

<sup>136</sup> Billy Wong, “Elderly tenants at risk of eviction,” South China Morning Post (26 January 1999).

members (including the applicant) must have at least seven years' residence in Hong Kong in order to qualify. All locally born children are considered to have met the residence qualification provided that at least one parent has satisfied the residence rule."<sup>137</sup>

While the Government states that the family ratio restriction is "fair and reasonable"<sup>138</sup>, government officials have privately admitted that "the housing rule is discriminatory and some have even agreed that it should be scrapped."<sup>139</sup> Numerous examples clearly indicate inequitable results and undesirable consequences. If a child is born on the mainland to a Hong Kong permanent resident, even though the child is entitled to the right of abode in Hong Kong, he is not entitled to live with his parents in public housing. It was also reported that in September 1997, just as a family of seven was about to get off the waiting list for a public housing unit after waiting since 1990, an elderly member of the household died, leaving three family members who met the seven-year residency rule and three family members who did not. Thus, the family will have to wait until the year 2001 when the remaining members have the requisite years of residency. Such experiences are known to be common<sup>140</sup>

The family ratio restriction violates the Government's obligations under Article 10 of the Covenant to protect the family and under Article 11 to protect the right of everyone and his family to adequate housing. Moreover, the restriction is contrary to the obligation of the Government to provide for these rights without discrimination on the basis of national or social origin, birth or other status, as required by Article 2(2) of the Covenant.

Human Rights Monitor requests your Panel to call upon the Government to abolish the family ratio rule and to revise its housing policies and regulations so that public housing rental restrictions will not divide the families of elderly tenants or families with mainland immigrants, so long as the primary applicant for the public housing unit is in compliance with residency and other requirements.

### *11.3 Inadequacy of private homes for the elderly*

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<sup>137</sup> HKSAR Government Report at para. 382.

<sup>138</sup> HKSAR Government Report at para. 382.

<sup>139</sup> Fanny Wong, "The family numbers game," South China Morning Post (2 December 1997).

<sup>140</sup> Fanny Wong, "The family numbers game," South China Morning Post (2 December 1997).

The Government readily admits in its own report that private sector accommodations for the elderly are “inadequate.”<sup>141</sup> The Government does not indicate what steps it will take to remedy this situation, aside from encouraging the elderly to join the waitlist for public rental housing. It should also be noted that according to Government statistics, 3,7000 have died before they were allocated a place at a care home.<sup>142</sup> There are currently 24,000 elderly

Efforts to enforce the standards established by the Residential Care Homes (Elderly Persons) Ordinance have failed. In May 1999, it was estimated that 60%, or 296 out of 466 private homes were unlicensed and did not meet the legal standards regarding fire safety, space, and staffing. The Social Welfare Department merely issued certificates of exemption so that these homes may operate while they make the necessary change in the meantime. However, such extensions are generally granted. The Social Welfare Department has stated that inadequate private homes will be driven out of the market by those who provide higher quality services.<sup>143</sup> Unfortunately, in Hong Kong, where housing is scarce, it is unlikely that such a claim is accurate.

Human Rights Monitor requests that your Panel call upon the Government to provide a timeline indicating when private homes for the elderly will either be brought into compliance with safety standards or forced to close, and to devise a comprehensive plan for ensuring the safety of the elderly in the meantime and for re-housing those who may be left homeless as the result of the closing of inadequate private accommodations.

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<sup>141</sup> HKSAR Government Report at para. 376.

<sup>142</sup> Cynthia Wan, “Elderly demand rights laws,” South China Morning Post (2 January 1999).

<sup>143</sup> Cynthia Wan, “Elderly at risk amid U-turn on safety laws,” South China Morning Post (31 May 1999).



## ARTICLE 12

Article 12(1) of the Covenant recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

### *12.1 Establishing an independent and effective mechanism for complaints against medical professionals*

In November 1997, the Health and Welfare Bureau commissioned a team of economists, physicians, epidemiologists, and public health specialists from Harvard University to examine Hong Kong’s health care system. The result was a report entitled “Improving Hong Kong's Health Care System: Why and For Whom?,” commonly referred to as the “Harvard Report.”<sup>144</sup> While the Harvard Report acknowledges that Hong Kong has a cost-effective health care system providing everyone with equitable “access to essential health care regardless of their financial means,” it also identifies a number of grave problems.

First, the Harvard Report states that the “quality of health care is highly variable.” For example, in its research on drug prescription behavior in Hong Kong, the Harvard Report noted the following differences between private and public doctors.

Financial incentives appear to influence the amount and type of medication prescribed. In the fee-for-service private sector, doctors benefit by providing more drugs and raising the fee accordingly. Conversely, public doctors do not have financial incentives to over-prescribe nor to encourage unnecessary follow-up visits. It is therefore enlightening to compare the drug prescription behavior for public and private sectors . . . [P]rivate GPs are more likely to prescribe antibiotics and multiple drugs than public doctors. While 60% of public cases received the full course of antibiotics, only 8% of patients going to private GPs did so.<sup>145</sup>

The Harvard Report attributes deficiencies in the quality of health care in part to the absence of an effective complaint mechanism for patients. Existing complaint mechanisms, such as those in the Hospital Authority, the Department of Health and the Medical Council are dominated by physicians and there is little public confidence

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<sup>144</sup> Harvard Team, Improving Hong Kong's Health Care System : Why and For Whom? (hereinafter “Harvard Report”) at p. 3.

<sup>145</sup> Harvard Report, at p. 62.

in their impartiality. For example, Section 3 of the Medical Registration Ordinance provides for 24 registered medical professionals and 4 laypersons to be appointed to the Medical Council. It is apparent that the medical professionals are more accountable to their professional colleagues rather to the general public since they are nominated by the University of Hong Kong, the Chinese University of Hong Kong, the Hospital Authority, the Academy of Medicine, the Hong Kong Medical Association, and registered medical practitioners.

The Harvard Report noted that “because the Public Complaints Committee (PCC, which is where a small fraction of [Hospital Authority] complaints end up) finds most complaints and appeals to be ‘unsubstantiated,’ disgruntled patients see little point in going to the effort of lodging a formal complaint.”<sup>146</sup> Medical professionals are reluctant to criticize and file reports against their colleagues. Interviews conducted by the Harvard Team revealed that even though the medical professional code obliges doctors to report the incompetence of a colleague, in fact, the Medical Council has been known to “refus[e] to allow them to file a complaint against the misconduct of other physicians, on grounds that only patients, but not doctors themselves, have the right to file a complaint.”<sup>147</sup>

In July 1999, the Deputy Secretary for Health and Welfare indicated that the Government was considering creating an independent medical ombudsman to help patients file complaints. Patients rights groups have also called for the proposed ombudsman to be empowered to initiate investigations or practices even though no individual complaint has been filed. The Health and Welfare Bureau maintained, however, that the “disciplinary power of medical professionals should remain in the hands of the Medical Council.”<sup>148</sup>

Human Rights Monitor recognizes that Article 142 of the Basic Law provides that the Government shall “recognize the professions and the professional organizations recognized prior to the establishment of the Region, and these organizations may, on their own, assess and confer professional qualifications.” Accordingly, the authority of the Medical Council to register and discipline medical professionals should be maintained. With regard to the exercise of disciplinary powers, however, Human Rights Monitor believes that the participation of laypersons should be increased in order to offset any tendency of medical professionals to “protect their own.” Thus,

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<sup>146</sup> Harvard Report, at p. 59.

<sup>147</sup> Harvard Report, at p. 58.

<sup>148</sup> Ella Lee, “Medical ombudsman plan,” South China Morning Post (26 July 1999).

Human Rights Monitor recommends the establishment of a separate disciplinary committee within the Medical Council, in which laypersons would constitute a majority.<sup>149</sup>

Human Rights Monitor requests your Panel to urge the Government to appoint an independent Medical Ombudsman to receive patient complaints and to investigate misconduct by doctors. The Government should also amend the Medical Registration Ordinance to increase the participation of laypersons within the Medical Council and to establish a disciplinary committee within the Medical Council in which laypersons would constitute a majority.

## 12.2 *Ensuring reasonable fees for healthcare*

High fees for healthcare may pose a significant obstacle to exercising the right to enjoy the highest standard of health. The Government should pay attention to all factors that impact on the rate of medical fees, with a view toward ensuring reasonable fees for healthcare.

Arbitrariness and abuse in the charging of medical fees has long been a concern in Hong Kong. In April 1999, after the Harvard Report raised concerns about overcharging by doctors, it was reported that one surgeon charged HK\$ 8,000 for a hysterectomy while another charged HK\$ 108,000 for the same operation.<sup>150</sup> The Secretary for Health and Welfare Katherine Fok Lo Shiu-ching has indicated that the Government would consider regulating doctor's fees.<sup>151</sup> At minimum, there must be transparency in the way fees are set and patients must be able to receive information about medical fees. As already acknowledged by the Hong Kong Medical Association, patient's rights include the right to "know the fees and charges prior to consultation or receiving any procedure."<sup>152</sup>

Furthermore, in June 1998, the Hong Kong Medical Association expressed concern that rental increases for public housing estates where healthcare clinics are situated may result in corresponding increases in medical fees. It noted that after the

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<sup>149</sup> According to Section 21 of the Medical Registration Ordinance, the Medical Council, as a whole, makes decisions regarding disciplinary action after a case has been referred to it by the Preliminary Investigation Committee, the Health Committee or the Education and Accreditation Committee.

<sup>150</sup> Ella Lee, "Doctors to be questioned about fees," *South China Morning Post* (27 April 1999).

<sup>151</sup> Chris Yeung, "Regulating doctors' fees an option," *South China Morning Post* (29 April 1999)

<sup>152</sup> Hong Kong Medical Association and Consumer Council, "Patient's Rights and Responsibilities."

Housing Authority charged 4 clinics in Long Ping Estate with a 52% rental increase, their rent jumped to 220% of the market rate. The Hong Kong Medical Association warned that to offset the rental increases, doctors may have to increase their medical fees by 6% - 25%.<sup>153</sup>

Human Rights Monitor requests your Panel to urge the Government to examine all factors that impact on the rate of medical fees and take all appropriate measures to ensure reasonable fees for medical services. The Government should increase transparency in the charging of doctor's fees by providing patients with information about how fees are established and a scale of reasonable rates. The Government should also coordinate its housing policy so that health clinics situated on public housing estates are not adversely affected by rent increases.

### 12.3 *Lack of government policy on breast-feeding*

Article 12(2)(c) of the Covenant requires the government to take steps to provide for the healthy development of the child. The World Health Organisation and UNICEF have long emphasized the advantages of breast-feeding over baby formula, citing benefits for the baby's immune system and other aspects of the baby's health.

In Scandinavia and China, the rates for breastfeeding upon discharge from hospitals are 99% and 90% respectively.<sup>154</sup> In Hong Kong, however, only 47% of women breast-feed. After four weeks, the rate drops to 25% and then after eight weeks to 16%.<sup>155</sup> The Government has done little to promote breast-feeding among new mothers. Women have been harassed in hotels, restaurants, and department stores for breast-feeding in public. The Government-owned MTR and railway have rules prohibiting eating and drinking on trains which would presumably apply to breast-feeding. One mother reported that although she intended on breast-feeding, nurses gave her daughter baby formula, against the mother's express wishes, making it difficult for the baby to return to breast-feeding after she had already been fed from a bottle.<sup>156</sup>

In 1981, the World Health Assembly adopted the International Code of Marketing of

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<sup>153</sup> Hong Kong Medical Association, "Housing Authority's misconception in bringing about unnecessary burden of medical expenses on the public." (31 July 1998).

<sup>154</sup> Maggie Holmes, "The battle with the bottle," South China Morning Post (11 April 1999).

<sup>155</sup> "SAR must have a policy on breast-feeding," South China Morning Post (12 December 1997)

<sup>156</sup> Maggie Holmes, "The battle with the bottle," South China Morning Post (11 April 1999).

Breastmilk Substitutes. According to Article 5.1 of the Code, “There should be no advertising or other form of promotion to the general public of” baby formula products. Article 5.2 further states that “[m]anufacturers and distributors should not provide, directly or indirectly, to pregnant women, mothers or members of their families, samples of products within the scope of this Code.” Both of these provisions are blatantly ignored in Hong Kong, where television programs carry advertisements for baby formula and hospitals offer free samples.<sup>157</sup>

Human Rights Monitor requests your Panel to urge the Government to incorporate the International Code of Marketing of Breastmilk Substitute into Hong Kong’s legislation and to develop a program to encourage breast-feeding. The Government should prohibit the improper promotion of baby formula, as outlined under the Code, and should ensure that hospitals provide new mothers with adequate information about breast-feeding. Furthermore, the Government should ensure that all public places and public transport allow for breast-feeding.

#### 12.4 *Epidemic diseases*

Article 12(2)(c) of the Covenant requires the government to take steps to prevent, treat and control epidemic diseases.

##### 12.4(a) *Abuses in the prescription of antibiotics*

As noted above, the Harvard Team discovered abuses in the prescription of drugs -- in particular, of antibiotics -- in Hong Kong. While antibiotics should only be used to treat diseases involving a bacterial infection, in Hong Kong, they are often prescribed for non-infectious diseases with minor symptoms such as a sore throat. The unnecessary use of antibiotics, coupled with the tendency of doctors to prescribe high amounts of antibiotics for a short period of time, is causing long-term harmful effects. According to the Harvard Report,

In Hong Kong, private physicians usually dispense only 2 to 3 days of antibiotics (when the full course of antibiotics is actually longer), asking patients to return when they finish the drugs without explaining to them the significance of or the need to finish the entire course of antibiotics. Partly as a result, uninformed patients may not obtain the remainder of the course or may stop

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<sup>157</sup> Maggie Holmes, “The battle with the bottle,” South China Morning Post (11 April 1999).

taking the medication once they feel better.<sup>158</sup>

The failure to take the full course of antibiotics may result in the build-up of resistant bacteria in the body. Alarmingly, the Harvard Report notes that the rate of resistance to penicillin among pneumonia patients in Hong Kong is 57%, compared to 5 – 10% in European countries.<sup>159</sup> Protecting the immune system is an integral part of preventing and treating epidemic diseases. Human Rights Monitor requests your Panel to call upon the Government to take immediate and effective measures to monitor and prevent abuses in the prescription of antibiotics. Given the serious threat to the health of the individual and to the public health posed by incomplete prescriptions of antibiotics, the Government should consider passing appropriate legislation to prohibit the incomplete prescription of antibiotics, unless justified by exceptional circumstances.

*12.4(b) Effective prevention and control of the avian flu and other epidemics*

The development of the avian flu in Hong Kong, first reported in May 1997, served to highlight the Government's lack of infrastructure and coordination for dealing with epidemic emergencies. From May until December 1997, when the Government suddenly ordered the slaughter of chickens to stem the outbreak of the flu, the public lacked adequate information or guidance from the Government to properly respond to the avian flu. Responding to this criticism in January 1998, Chief Executive Tung Chee-hwa merely stated, "The fact that we have not spoken out on some issues does not mean we do not care about it. It's such a new virus we have to be extremely careful."<sup>160</sup> Even after the chickens were slaughtered, they were often simply left on the roadside, due to lack of coordination between the Agriculture and Fisheries Department, the Regional Services and Urban Services and the Environmental Protection Department.<sup>161</sup> Months after the immediate scare of the avian flu, the poultry markets returned to their former unhygienic conditions. In 1999, 6 more people and 70% of the poultry in Hong Kong were reported to have been exposed to a

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<sup>158</sup> Harvard Report, at p. 63.

<sup>159</sup> Id.

<sup>160</sup> Chris Yeung, "Crises a lesson in vigilance, says Tung," South China Morning Post (17 January 1998).

<sup>161</sup> C.K. Lau, "Question of competence in corridors of power" South China Morning Post (17 January 1998).

new strain of avian flu.<sup>162</sup>

Since the avian flu of 1997, the Government has demonstrated similar ineptitude in handling other epidemic and hygiene emergencies. In June 1999, the Government announced that it would be withdrawing one-third of all baby-formula from the market for fear that they might contain cancer-causing dioxins. However, the Department of Health failed to properly and immediately inform pediatricians and the general public of which brands had been withdrawn, leaving mothers with no information about whether they were feeding their babies untainted formula. While promising to provide the requested information at a later time, a spokesperson for the Department of Health simply advised mothers “not to be over-anxious.”<sup>163</sup>

Rather than concentrating on creating efficient channels for handling epidemic emergencies, the Government has instead used the aviary flu tragedy to achieve certain political objectives, namely, to abolish the regional and urban councils which responsible for cultural, recreational and health matters. These councils were created under the British colonial administration to create a channel for grassroots decision-making by permitting direct popular elections of council members. The abolition of these councils would further rollback democracy in Hong Kong.

Human Rights Monitor requests your Panel to urge the Government to put in place effective mechanisms for preventing and responding to epidemic emergencies and to pay particular attention to providing the general public with adequate information during such emergencies.

#### *12.4(c) Tolerance of discrimination against AIDS patients*

In its report, the Government cites a number of measures it has taken to raise public awareness about HIV/AIDS prevention, care and control, including the establishment of the Advisory Council on AIDS, the Department of Health’s AIDS Unit, and the AIDS Trust Fund. The effectiveness of the Government’s efforts to educate the public about AIDS can be measured by the strong public reaction against the establishment of a health clinic that provided treatment for AIDS patients in Kowloon Bay. Residents of Richland Gardens had been demonstrating against the health

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<sup>162</sup> Ella Lee and Clara Loon, “Four more exposed to H9N2 bird flu virus,” South China Morning Post (4 August 1999).

<sup>163</sup> Audrey Parwani, “Officials trigger confusion after baby-milk scare,” South China Morning Post (9 June 1999).

clinic since plans to build the clinic were first announced in 1996.<sup>164</sup> However, if the Government took any efforts to address unfounded fears about AIDS or to speak out strongly against discrimination against AIDS efforts, such efforts bore no fruit. When the Kowloon Bay health clinic opened in June 1999, protesters were out in full force to harass and threaten patients, social workers and clinic staff. Lin Oi-chu, vice-chairwoman of the Hong Kong Coalition of AIDS Service Organisations, stated that “When I prepared to leave the health centre after a visit last week, several residents were standing at the entrance and kept washing the ground with jets of water as if implying we were dirty and disgusting.”<sup>165</sup>

Notable was the Government’s silence on the issue. With the exception of the Equal Opportunities Commission (EOC), no Government official, not even those responsible for health issues, made any strong public statements to affirm the right of AIDS patients to the services of the Kowloon health clinic. Sadly, when banners proclaiming “The elderly and children are weak. They must be away from sexually transmitted diseases” were affixed on government property, officials made no attempt to remove them until pressured by NGOs and the EOC.<sup>166</sup>

Members of the Legislative Council have called for an inquiry to see which government department were negligent in handling the incident the Kowloon Bay health clinic. Dr Leong Che-hung, a former legislator representing the medical sector at that time, stated “[T]here is no co-ordination and initiative because no one thinks it is important enough to take action.”<sup>167</sup>

Human Rights Monitor requests your Panel to urge the Government to investigate thoroughly the incidents of discrimination against AIDS patients at the Kowloon Bay health clinic and to formulate appropriate strategies, including public education, to prevent the recurrence of similar incidents in the future.

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<sup>164</sup> “Residents opposed to AIDS clinic,” South China Morning Post (5 February 1996).

<sup>165</sup> “Lin pledges to fight for patients' rights,” Hong Kong Standard (21 June 1999).

<sup>166</sup> Chloe Lai, “Battle on to remove protest banners at Aids clinic,” South China Morning Post (23 June 1999).

<sup>167</sup> Chloe Lai, “Probe into action on clinic discrimination,” South China Morning Post (30 June 1999).



## ARTICLES 13 and 14

### 13.1 *Gender stereotyping in education*

Article 13(1) of the Covenant states that the right of everyone to education refers to “education . . . directed to the full development of the human personality [and enabling] all persons to participate effectively in a free society.” Since Article 3 of the Covenant further requires Governments to guarantee the exercise of rights without discrimination on the basis of gender, the practice of gender stereotyping and limiting the opportunities of individuals to receive training in particular subjects on the basis of their gender would be contrary to the Covenant.

In April 1999, the Equal Opportunities Commission conducted a survey of the teaching of Design & Technology and Home Economics in 471 secondary schools. From the 200-plus questionnaires returned, the EOC learned that in offering the two subjects, most co-educational schools did not give students the freedom to choose but simply assigned the boys to Design & Technology and the girls to Home Economics. Moreover, all single-sex boy's schools only offered Design & Technology while merely 4% of single sex girl's schools offered both subjects. Finally, the study found that schools generally devoted more resources to Design & Technology than to Home Economics.<sup>168</sup>

Upon releasing the results of the study, the EOC stated that these educational practices violated the Sex Discrimination Ordinance. Said EOC Chairwoman Dr. Fanny Mui-ching Cheung, “The restriction of study of Design & Technology and Domestic Science, on the basis of sex, not only reinforces gender stereotypes in our younger generation but also prevents boys and girls from developing skills which are of practical use to both sexes.” The EOC has indicated that it will conduct workshops in October 1999 to encourage schools to structure its curriculum so that it will be in compliance with the Sex Discrimination Ordinance.

In addition to outright restrictions on taking courses, more subtle obstacles have led to the segregation of certain fields by gender. For example, while women studying education and arts at the University of Hong Kong in 1990 constituted 90.5% and 79.6%, respectively, women studying engineering and medicine only composed 6.2%

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<sup>168</sup> Equal Opportunities Commission, “EOC Releases the Results of a Study on Design & Technology and Home Economics in Secondary Schools.” (28 July 1999).

and 27.8%, respectively, of the total students in those fields.<sup>169</sup> Some of the reasons that have been suggested for these gender disparities include the expectations of teachers and parents, and the gender distribution of teachers and professors.<sup>170</sup>

Human Rights Monitor requests your Panel to urge the Government to continue to study all forms of gender stereotyping in education, and to develop to abolish gender segregation in academic fields by publicly condemning such practices and raising awareness among educators and parents about these issues. The Government should issue internal guidelines on eradication all forms of gender discrimination in education, make the implementation of such guidelines a condition of funding arrangements, and require schools to submit periodic action plans detailing steps they have taken to implement such guidelines.

### 13.2 *Educational opportunities for children with special needs*

Article 13(2)(a) and Article 14 of the Covenant call upon Governments to work towards the provision of free and compulsory primary education. Since Article 2(2) requires Governments to guarantee the exercise of rights without discrimination, children with special needs should also be guaranteed access to educational opportunities, at the primary school level.

With regard to the physical accessibility of schools, the Government notes in its report that “all new schools planned for completion in May 1997 and thereafter will be purpose-designed to ensure easy access for disabled children.”<sup>171</sup> The Government fails to mention, however, what steps it will take to ensure that schools built prior to 1997 will be accessible to children with special needs. Even when schools may have the physical infrastructure to accommodate children with special needs, the attitudes of school administrators may prove to be an even greater barrier. In June 1999, it was reported that a primary school student recovering from surgery was banned by his principal from attending school “as long as he needs needs to use his wheelchair.” The child was required to remain at home for one semester, and allowed to return only after repeated requests by the parents. The boy was subsequently refused use of the staff bathroom located next to his classroom and forced to use the student bathrooms

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<sup>169</sup> Choi Po-king, “Women and Education in Hong Kong,” in Veronica Pearson and Benjamin Leung, *Women in Hong Kong* (Oxford: 1995) at p. 104.

<sup>170</sup> Choi Po-king, “Women and Education in Hong Kong,” in Veronica Pearson and Benjamin Leung, *Women in Hong Kong* (Oxford: 1995) at pp.109 – 120

<sup>171</sup> HKSAR Report, at para. 548.

upstairs. Upon an investigation, the Equal Opportunities Commission found that, contrary to the principal's assertions, the wheelchair did not obstruct the hallway nor did teachers object to the student's use of their bathroom.<sup>172</sup>

The Government states that it launched a pilot project in September 1997 to promote the integration of children with special needs into mainstream schools. Originally intended to accommodate 80 students and involve 10 schools, the integration program fell short of its projected goals due to opposition from school administrators and parents opposed participation in the program. In July 1999, a mother filed a lawsuit against the Director of Education and a school headmistress after her speech-impaired child was refused placement at the Shau Kei Wan Government AM Primary School.<sup>173</sup>

Efforts to promote integration of children with special needs into international schools have also been problematic. In June 1999, it was reported that at least five children have been waiting one year to attend primary school. Only one private international school, the Korean International School, sponsors a program for special-needs children, while a few international schools accept special-needs students on a case by case basis. Although a number of schools run by the government-subsidized English Schools Foundation are able to accommodate children with special needs, students also may have to remain on waitlists for over one year; moreover, some parents have reported that the English Schools Foundation will be limiting the participation of autistic children in its programs.<sup>174</sup> As a result, some English-speaking students with special needs have been forced to go abroad to enroll in primary school.<sup>175</sup>

The conditions of students who are unable to be integrated into mainstream schools and attend special schools should be closely monitored. Special schools often have high student-teacher ratios, little training for teaching disabled students, and no services such as physiotherapy and speech therapy. Parents have also complained about the physical conditions of the schools, including overcrowding, falling objects, odour from rubbish dumps, and rat infestation.<sup>176</sup>

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<sup>172</sup> Shirley Kwok, "Principal banned wheelchair boy," South China Morning Post (7 June 1999).

<sup>173</sup> Alison Smith and Magdalen Chow, "Woman sues to claim son's school place," South China Morning Post (15 July 1999).

<sup>174</sup> Cynthia Wan, "Disabled face long wait for schools," South China Morning Post (7 June 1999).

<sup>175</sup> Patsy Leung, "Studying together as equals," South China Morning Post (28 April 1997).

<sup>176</sup> Shirley Kwok, "Angry parents may turn to watchdog for help," South China Morning Post (8 November 1997).

Human Rights Monitor request your Panel to urge the Government to ensure that children with special needs are able to enjoy the right to education. The Government should improve the physical accessibility of schools for children with special needs, and educate school administrators, teachers, and parents about the right of such children to education. The Government should continue to promote the integration of children with special needs in both local and international mainstream schools. For students who attend special schools, the Government should ensure that the special schools provide a safe learning environment, adequate training for its teachers, and appropriate services such as physiotherapy and speech therapy for its students.

### 13.3 *Adult education in prison*

Article 13(2)(d) provides that “[f]undamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.”

In 1997, Human Rights Monitor and Human Rights Watch conducted an inspection of 22 prisons in Hong Kong. The delegation observed that while school education is offered to juvenile prisoners, the educational program for adult offenders is lacking. This is evident from Annex 35 of Government’s Report and a comparison of the programmes for young offenders and for adult offenders. Young offenders receive a wide range of vocational training, culminating in external accreditation, and a common core education programme based on primary and secondary school syllabuses.<sup>177</sup> However, adult offenders may only take evening classes, correspondence courses, and self-study programmes. It is unlikely that the educational opportunities available to adult offenders would provide them with basic skills, such as literacy, to help them re-integrate into society upon release.

Human Rights Monitor requests your Panel to urge the Government to expand the educational opportunities offered to adult inmates in prison, to provide basic skills such as literacy and to ensure that they have completed the requirements of form three (secondary education).

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<sup>177</sup> HKSAR Report, Annex 35: Education programmes for inmates in prisons.

## ARTICLE 15

### 15.1 *Eliminating potential conflict of interest in the Hong Kong Arts Development Council*

Article 15(1)(a) of the Covenant establishes the “right of everyone to take part in cultural life.”

The Government states that the Hong Kong Arts Development Council (ADC) was established in 1994 to “plan, promote and support the broad development of the arts.” Since its inception, however, the ADC has been plagued by charges of conflicts of interest and biases in grant-making. In 1997 – 98, it was reported a performing arts group and an internet lobby group, both chaired by an ADC member, received \$300,000 and \$225,500 respectively. Even though members with a conflict of interest cannot participate in the discussions on a *particular* grant application, ex-members of the ADC claim that there is still pressure to vote in a certain way.<sup>178</sup> In April 1999, artist and chairman of the Hong Kong Art Exposition Group filed a suit against the Hong Kong Arts Development Council alleging discriminatory funding policy in contravention of the Basic Law.<sup>179</sup>

Artists have called for the establishment of an independent monitoring system to investigate potential conflicts of interest. In 1998, the ADC invited the Independent Commission Against Corruption (ICAC) to conduct an audit of its grant allocation system. In its report issued in February 1999, the ICAC recommended, inter alia, that members with a conflict of interest in a “particular *category* of applications” should withdraw from discussions of that category, that grant applicants must list all ADC members and staff involved in the proposed projects, and that applicant appeals should be considered by a separate committee. Human Rights Monitor welcomes the ADC’s efforts to invite an ICAC inquiry on its own initiative and hopes that the ADC will promptly review and implement recommendations by the ICAC.

Human Rights Monitor requests your Panel to urge the Arts Development Council to address the problems of actual and perceived bias in grant allocation and to ensure the right of everyone to participate in Hong Kong’s cultural life on a fair and equal basis.

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<sup>178</sup> Charlotte Parsons, “Artists cross paintbrushes over funding,” *South China Morning Post* (17 April 1999).

<sup>179</sup> Angel Lau, “‘Anguish’ artist sues for \$100m over bias,” *South China Morning Post* (17 April 1999).

## 15.2 *Eliminating political censorship*

As the major providers of cultural facilities, the Provisional Urban Council and Provisional Regional Council have the responsibility to respect the freedom of expression and to ensure pluralism and diversity in artistic expression, without regard for the political content of the art. Unfortunately, the Councils' treatment of the Pillar of Shame, a sculpture commemorating the Tiananmen Square massacre of 1989, reveals that decisions regarding the public display of art have been motivated by political considerations.

The Government claims in its report that the decision of the Provisional Urban Council to deny an application for the display of the Pillar of Shame for three months in Kowloon or Chater Garden during 1997 was purely benign. "The Provisional Urban Council reached its decisions having considered all relevant factors including the fact that the dates applied for clashed with events sponsored by other applicants that the Council had already approved. The Council was also concerned that the presence of the sculpture and related display boards would inconvenience park users and would be inconsistent with the primary use of the parks."<sup>180</sup> The Government fails to explain, however, why an application by the Association for the Celebration of the Return of Hong Kong to hold a carnival in the Chater Garden for the handover failed to trigger similar concerns about inconvenience.

When the Urban Council voted again in 1998 to reject an application to put the Pillar of Shame on permanent display, the councilors were more explicit about the political factors behind their decision-making. Ip Kwok-chung of the pro-Beijing Democratic Alliance for the Betterment of Hong Kong stated that "the council should not agree to display objects which were controversial." Another councilor said Hong Kong should not get involved with the Tiananmen Square massacre since "[t]his incident happened in Beijing and we don't need to focus so much on events happening in Beijing as we are under 'one country, two systems.'"<sup>181</sup>

The municipal councils have been abolished. The cultural promotion functions exercised by these bodies would be assumed by a newly-created Culture and Heritage Commission to be appointed by the Chief Executive. Human Rights Monitor is concerned that given the closeness of the Commission to the Chief Executive, and the

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<sup>180</sup> HKSAR Government Report, at para. 604.

<sup>181</sup> Genevieve Ku, "Urbco votes down Pillar of Shame park home," *South China Morning Post* (3 June 1998).

lack of public input in selection of the Commission members, the body would simply be an organ for “cultural indoctrination.”<sup>182</sup> Moreover, since the Commission may be merely an advisory body, it appears that the non-elected Government would retain the power to make decisions relating to art and cultural, a power that had been previously delegated to a popularly-elected body.<sup>183</sup>

The executive arms of the abolished councils has been reformed. One of the new department so formed is the Leisure and Cultural Services Department. The Department is in control of a lot of indoor and outdoor facilities important to performances, meetings and other gatherings. Its decision to allow Falun Gong followers to rent a main venue under its control for a gathering has triggered a political controversy. China officials in their official capacity, have for the first time after the handover, openly pressured the Government into action to curb and outlaw their activities although what Falun Gong followers have been doing is nothing but peaceful exercise of their freedoms of association, assembly, expression and to upholding and practicing their belief in Hong Kong. Human Rights Monitor is still monitoring the development.

Human Rights Monitor requests your Panel to call upon the Government to respect the freedom of expression and to ensure that all relevant government bodies authorized to make decisions about the public’s access to art and to public venue remain free of political biases and refrain from exercising political censorship.

### 15.3 *Protection of intellectual property*

Article 15(1)(c) of the Covenant recognizes the “right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Human Rights Monitor notes and welcomes the Governments efforts to protect intellectual property rights in accordance with the Covenant.

In February 1999, the Trade and Industry Bureau issued a consultation paper on amending the existing regime for protecting intellectual property rights , including strengthening penalties for intellectual property, copyright, and trademark offences

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<sup>182</sup> Jimmy Cheung, “Fear of cultural indoctrination in new policy,” South China Morning Post (27 March 1999).

<sup>183</sup> Tung Chee-hwa was selected by a group of 400 people hand-picked by the Chinese authorities. The Hong Kong people had practically no say in his selection.

and imposing consumer liability. Human Rights Monitor believes that any policy about the protection of intellectual property rights must also take into consideration the adverse impact for individuals with fewer resources. For example, while Human Rights Monitor does not condone inappropriate and unlicensed use of computer software, it also recognizes that the strengthening of protections for intellectual property rights may result in the inability of students or other individuals with limited resources to purchase and use software. Accordingly, the Government should consider developing incentives for computer software companies to provide schools with software for free or at a lower cost. The Government must examine ways in which intellectual property rights may be protected without unduly restricting the rights of all people to enjoy the benefits of technological and scientific developments.

Human Rights Monitor requests your Panel urge the Government to develop protections for intellectual property rights with due regard for the adverse impact on individuals with fewer resources.

#### *15.4 Violations of the right to property in Antiquities and Monuments Ordinance*

Article 15(2) of the Covenant provides that the “steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.”

The Government states that 66 declared monuments and 8 deemed monuments are protected under the Antiquities and Monuments Ordinance. However, these monuments comprise only a small percentage of the numerous historical landmarks that have been torn down in recent decades to make room for towering office buildings, shopping centres and residential complexes. Today, approximately 94% of Hong Kong’s buildings were built after World War II.<sup>184</sup>

One significant obstacle to historical preservation can be found in the Antiquities and Monuments Ordinance. Section 4 of the Antiquities and Monuments Ordinance empowers the Chief Executive to proceed with the declaration of a building or structure as a monument despite the fact that it is within private land and the private owner has objected. While Section 8 of the Ordinance permits the government to compensate the owner for his financial loss, compensation is not obligatory.

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<sup>184</sup> Fiona Holland, “The importance of saving our heritage,” South China Morning Post (23 December 1997).



Moreover, Section 8(3) of the Ordinance prohibits the Government from granting compensation “in respect of financial loss which has been or may be suffered in connection with a contract made . . . after the service of a notice” that the property will be designated as a monument. This provision unduly restricts the common law principle that compensation should be awarded according to considerations of fairness and equity.

In practice, the Government “prefers the path of persuasion [and] no private dwelling has ever been declared a monument without the owner’s agreement.”<sup>185</sup> The Home Affairs Bureau has stated that the “difficulty in obtaining private landowner’s consent for declaration mostly stems from the fact that declaration will entail curtailment of private property rights. We have to consider the need for adequate compensation.”<sup>186</sup>

Human Rights Monitor believes that the state’s obligation to conserve Hong Kong’s cultural heritage must be balanced against the right of the individual to be free from the arbitrary deprivation of his property. Human Rights Monitor requests your Panel to urge the Government to amend the Antiquities and Monuments Ordinance so as to provide for just and equitable compensation when private property has been declared a monument.

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<sup>185</sup> Id.

<sup>186</sup> Home Affairs Bureau, “Heritage Preservation: Review of Legislation and Policy” (December 1998), at para. 10.