

# **HONG KONG HUMAN RIGHTS MONITOR**

## **REPORT ON THE REFORM OF THE JUSTICE OF THE PEACE SYSTEM**

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### Introduction

The Justice of the Peace (“JP”) system has the potential to be a critical mechanism for monitoring prison conditions and addressing prisoner complaints. Unfortunately, in the two years since the enactment of the Justice of the Peace Ordinance (Cap. 510) on 22 May 1997, the potential of the office has yet to be realized. Human Rights Monitor welcomes the government’s efforts to examine the JP system and to consider proposals for reform. We have also carefully reviewed the government’s reports on the JP system, including the Administration Wing’s Consultation Paper on the “Review of the Justices of the Peace System” and the relevant sections of the Ombudsman’s 1997-1998 Annual Report and “Report of the Study on Correctional Services Department’s Complaint Handling System.”

In this report, Human Rights Monitor identifies a number of overarching

problems that require structural changes in the JP system. We have also proposed amendments to the Justice of the Peace Ordinance and other relevant laws in order to clarify, strengthen or augment the duties and responsibilities of the JPs. Our recommendations fall into the following six broad categories: 1) appointment and dismissal of JPs, 2) training JPs, 3) visits by JPs, 4) communications and complaints to JPs, 5) periodic reports by JPs, and 6) visiting other detention facilities.

Our recommendations for reforming the JP system are without prejudice to our original position that the Hong Kong government should follow the model of the United Kingdom and establish an independent prison inspectorate.<sup>1</sup> Such an inspectorate would have a broad mandate to investigate conditions in the territory's penal facilities; report its findings to the responsible governmental authorities, to the legislature, and to the public; and make recommendations for reform.

## **1. Appointment and dismissal of JP**

### **1.1 Clarifying qualifications for appointment**

Rule 55 of the Standard Minimum Rules for the Treatment of Prisoners (hereinafter "Standard Minimum Rules")<sup>2</sup> requires that "[t]here shall be a regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority." To make the JP system an effective mechanism for the monitoring of prison conditions and the redress of prisoner grievances, the criteria for the qualifications of the JP should be clearly articulated in the Justice of the Peace Ordinance. Section 3 of the Justice of the Peace Ordinance only provides that the Chief Executive may appoint "any person ... whom he considers to be fit and proper." The Administration Consultation Paper states that additional criteria include the candidate's length of stay in Hong Kong and age, while inability to speak Chinese or English may not necessarily be a disqualifying factor.<sup>3</sup>

Section 3 of the Justice of the Peace Ordinance should be revised to encourage the selection of JPs who will be independent and knowledgeable critics of the prison

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<sup>1</sup> Human Rights Watch/Asia & Hong Kong Human Rights Monitor, Hong Kong Prison Conditions in 1997, June 1997, Vol. 9, No. 5 (hereinafter "HRW/Asia & HKHRM Prison Report"), at p.9.

<sup>2</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C(XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>3</sup> Administration Wing, Consultation Paper on the "Review of the Justices of the Piece System", February 1999 (hereinafter "Administration Consultation Paper"), at para. 16.

system, and sensitive and effective advocates for prisoners. Factors that should be considered in the appointment of JPs should include, *inter alia*, experience in counseling, prison administration, or detention conditions. The Chief Executive should also ensure balance in the composition of the JPs, so that they may respond effectively to the ethnic, linguistic and gender diversity of the prison population.

## 1.2 Clarifying grounds for dismissal

To ensure the independence of the JP, the Chief Executive should be empowered to remove the JP only on the basis of clearly specified grounds. Section 6(d) of the Justice of the Peace Ordinance, however, permits dismissal if “the [Chief Executive], having regard to public interest and all other circumstances of the case, considers that that justice of the peace is no longer fit and proper to remain appointed.” Not only is Section 6(d) impermissibly vague, but its reliance on the Chief Executive’s subjective determination of public interest is inappropriate. Section 6(d) should be clarified by articulating objective criteria for determining public interest.

Section 6(c) is also problematic because it requires the JP to first obtain the approval of the Chief Executive prior to an absence 6 months or more; otherwise, the Chief Executive may revoke the appointment of the JP. The provision, however, fails to articulate the bases on which the Chief Executive is to approve or reject such an absence. Human Rights Monitor believes that it is sufficient for the JP to give prior notice to the Chief Executive of the duration of and reasons for any prolonged absence from Hong Kong, and recommends that Section 6(c) be amended accordingly.

## 1.3 Including additional grounds for disqualification or dismissal

To maintain the integrity and impartiality of the JPs system, the Chief Executive should refrain from appointing individuals who may have a conflict of interest, of either a personal or financial nature. Similarly, individuals who have already been appointed as JPs but subsequently develop a conflict of interest should immediately bring such a situation to the attention of the Chief Executive. The Chief Executive may order the removal of the JP, unless other measures such as the temporary suspension of the JP or the re-assignment of the JP to another prison would be sufficient to resolve the conflict of interest. Sections 3 and 6 of the Justice of the Peace Ordinance should be revised to include conflict of interest as a consideration in the appointment and dismissal of a JP.

In Section 2 of this report, Human Rights Monitor proposes that JPs should receive comprehensive training so that they may perform effective and informed inspections of the prisons. We recommend that the failure to complete the training program in a timely manner should constitute grounds for the dismissal of a JP.<sup>4</sup>

#### 1.4 Establishing judicial procedures for removing JPs

Section 6(1) of the Justice of the Peace Ordinance provides that the Chief Executive may “by notice in writing to a justice of the peace revoke his appointment.” Given the lack of due process in the dismissal of a JP and the lack of clearly-articulated grounds for dismissal, as discussed in Section 1.2 of this report, the JP’s vulnerability to arbitrary dismissal by the Chief Executive may impact on his willingness to voice appropriate criticism of prison policies or of prison officials.

It is an established principle that decisions of the Chief Executive are subject to judicial review. Human Rights Monitor understands that the decision to remove a JP will be amenable to judicial review. We strongly oppose the inclusion of clauses that would exclude the court’s power to review the Chief Executive’s decision to remove a JP.

## **2. Training**

Despite their lack of experience with prison monitoring, JPs often receive little relevant training. The lack of training makes the JPs ill-equipped to deal with a comprehensive examination of prison conditions; as a result, JPs frequently focus on superficial issues such as the quality of the food. The Ombudsman has noted the insufficiency of JP training and knowledge regarding the Prison Rules and the operation of correctional institutions.<sup>5</sup> The Administration Wing has recently proposed to “organize a briefing for newly-appointed JPs and a seminar for non-official JPs every year.”<sup>6</sup>

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<sup>4</sup> In Section 3.1 of this report, we discuss the usefulness of the Board of Visitors (a body mandated to inspect prisons in the U.K.) and the Prison Rules of the UK as a model for the reform of the JP system. Rule 75(3)(b) of the Prison Rules of the UK provides that a JP may be terminated if “he has failed to undertake training he has been required to undertake under paragraph (2), by the end of the period specified in that paragraph.”

<sup>5</sup> Office of the Ombudsman, Report of the Study on the Correctional Services Department’s Complaint Handling System, June 1998 (hereinafter “Ombudsman Report on CSD”), at para. 7.4(a).

<sup>6</sup> Administration Consultation Paper, at para. 43

Human Rights Monitor welcomes the proposal to provide formal training for JPs. In such training sessions, JPs should, at a minimum, receive information about relevant international norms, including the Standard Minimum Rules, the Basic Principles for the Treatment of Prisoners<sup>7</sup> Additionally, the JPs should receive training in communication techniques for their interviews with prisoners, and in domestic laws, regulations, and procedures regarding prison and detention such as, *inter alia*, the Prison Rules. Finally, the JPs should be educated about psychological issues relevant to prisons and prison inspections, including the phenomenon of “capture” (whereby prison inspectors might develop an overly-friendly relationship with prison officials and lose their capacity for independent scrutiny of prisons).

Following the initial orientation training, the JPs should also be required to receive ongoing training on a semi-annual basis so that they may be updated on new legal developments. Since the official and the non-official JPs perform the same functions, the content of their training should be substantially similar.

### **3. Visits by JPs**

#### **3.1 Maintaining continuity of visits**

Currently, prison visits are assigned to JPs on a roster basis, therefore, visits to one institution are often conducted by different pairs of JPs over a period of time. The resulting lack of continuity in visits makes it difficult to follow-up on the implementation of recommendations or to monitor the resolution of a prisoner’s complaint. The lack of continuity also impacts negatively on the JPs ability to gain familiarity with the prison conditions, as well as with the prison’s staff and detainees.

The Ombudsman has raised concerns about the lack of continuity in prison visits.<sup>8</sup> The Administration Wing has recently recommended that “JPs who wish to visit a particular institution on a more regular basis be allowed to do so.”<sup>9</sup> Human Rights Monitor believes, however, that the practice of assigning JPs to particular institutions over a period of time should become a regular practice rather than conditional upon the individual wishes of the JPs. The system of the Board of Visitors used in the United Kingdom may prove instructive for Hong Kong.

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<sup>7</sup> Basic Principles for the Treatment of Prisoners, adopted and proclaimed by U.N. General Assembly resolution 45/111 of 14 December 1990.

<sup>8</sup> Ombudsman Report on CSD, at para. 7.4(g).

<sup>9</sup> Administration Consultation Paper, at para. 32.

In the United Kingdom, there are two external mechanisms for inspecting prisons. Section 5A of the Prison Act provides for the appointment of a Chief Inspector of Prisons by Her Majesty, while Section 6 requires the Secretary of State to appoint a Board of Visitors, with at least two justices of the peace, for each prison. The general right of justices of the peace to visit prisons is also established in Section 19. Part V of the Prison Rules of the U.K., attached as an Appendix 1 to this report, lays out the structure and functions of the Board of Visitors in greater detail. The Prison Rules of the U.K. require that the Board of Visitors for each prison meet at the prison at least eight times during a 12-month period. A quorum for the meetings requires the presence of at least three members. The duties of the Board of Visitors include inspecting the prison and the treatment of prisoners, hearing the complaints and requests of prisoners, inquiring into any report of injury, and preparing an annual report to the Secretary of State.<sup>10</sup>

Human Rights Monitor proposes that a Board of Visiting JPs (“Board”) be established for each prison, along the lines of the current system in the U.K. The Board should consist of 10 JPs. The establishment of a Board for each of the 23 penal institutions would involve the commitment of less than one-quarter of the 970 JPs presently available.<sup>11</sup> To ensure the independence of each Board, at least half of the members should be non-official JPs.

The Board, as a group, should inspect its assigned prison at least twice a year. During the regular fortnight prison visits required by Rule 222(1)(a) of the Prison Rules, at least one of the pair of JPs should be a member of the Board; that Board member should also be responsible for briefing the JPs conducting the next fortnight visit. By setting the membership of the Board at 10, each member would have to make a maximum of only three prison visits per year, either in his capacity as a member of the Board or as part of the pair of visiting JPs.

The participation of Board members in the fortnightly visits would help maintain continuity in the prison visits, while the involvement of new, non-Board members would guard against the phenomenon of “capture” and provide fresh perspectives. The introduction of these new arrangements should be without prejudice to the continuing right of JPs, regardless of whether or not they belong to the Board, to

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<sup>10</sup> Rules 76 to 80 of the Prison Rules of the U.K.

<sup>11</sup> According to the Ombudsman, there are 286 official JPs and 664 non-official JPs. Ombudsman Report on CSD, at para. 7.1.

conduct surprise visits.

The Board should convene Board meetings on a semi-annual basis. While the attendance of Board members would be required, other non-Board JPs (particularly those that have or will be conducting visits to the Board's assigned prison) should be invited to participate. Members of the public, including academics, prison chaplains, non-governmental organizations, and friends and family of prisoners, should also be welcomed at the Board meetings. Board meetings should discuss the findings from recent prison visits, the complaints received from prisoners and the general public, recommendations for improvement, and steps taken to implement such recommendations.

Finally, as discussed further in Section 5 of this report, the Board should produce an annual report on its assigned prison.

### 3.2 Conducting surprise visits

Maintaining the element of surprise in prison visits is critical to ensuring that JPs have uncensored exposure to prison conditions and unrestricted access to prisoners. Recognizing the importance of surprise visits, even some JPs have called for all visits to prisons to be unannounced.<sup>12</sup> While the Justice of the Peace Ordinance and the Prison Rules give the JPs adequate legal authority to conduct surprise visits,<sup>13</sup> the Ombudsman has noted that “[a]lthough [JPs] may theoretically make unannounced visits, it is practically not possible.”<sup>14</sup> Advance notice of visits by JPs may be given to the prison staff in the course of arranging for the government transport of JPs, or through other mechanisms.

In August 1998, two JPs, Emily Lau and Paul Chan, attempted to conduct a surprise visit at the Ma Po Ping Prison. Their request was technically refused. Instead, the Superintendent was immediately called in and the two JPs were permitted to accompany him on a “Superintendent’s inspection.” This incident highlighted the absence of clear procedures respecting surprise visits by JPs.

To strengthen the ability of JPs to make surprise visits, Human Rights Monitor

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<sup>12</sup> Administration Consultation Paper, at para. 25.

<sup>13</sup> Section 5 of the Justice of the Peace Ordinance authorizes JPs to visit any custodial institution without any restrictions. Furthermore, Rule 222(2) of the Prison Rules state that the “prisons and hostels shall be open to [the JPs] at all reasonable times during their tour of duty.”

<sup>14</sup> Ombudsman Report on CSD, at para. 7.4(f).

first proposes that Section 5 of the Justice of the Peace Ordinance and Rule 222(2) of the Prison Rules be amended to recognize explicitly the power of the JPs to conduct surprise visits.<sup>15</sup> A number of practical measures must be taken to maintain the surprise element of the visits by JPs. The JPs should be issued photograph identification cards to verify their status as JPs. The procedures for conducting visits should be established so that individuals, upon presentation of their JP identification cards, will be granted immediate and unhindered access to prisons without further consultation with the Chief Officer or other prison staff.<sup>16</sup> Human Rights Monitor welcomes the recommendation of the Administration Wing that while the government will continue to provide the JPs with transportation to the prison institutions, it will avoid advance notification of the time of the visits.<sup>17</sup>

Finally, Rule 222(2) of the Prison Rules states that the “names of the visiting justices shall be furnished by the Chief Secretary to the Commissioner.” It is unclear whether this obligation applies each time a JP plans to make a prison visit. While it may be appropriate for the Chief Secretary to provide the Commissioner with a list of the Board members and other JPs who may be visiting throughout the year, it would not be appropriate for the Commissioner to receive a schedule or any other materials which would directly or indirectly alert him to the timing of the visits. In so far as Rule 222(2) would compromise the surprise element of visits by JPs, the obligation to furnish the Commissioner with the names of the justices should be amended.

### 3.3 Conducting seminars to raise awareness about international norms on detention

According to Rule 233 of the Prison Rules, JPs may, upon approval by the Commission, organize lectures directed at the “moral improvement of prisoners.” Rule 233 should be expanded to authorize the JPs to also organize lectures aimed at raising awareness about international norms on detention. Both prisoners and prison staff would benefit from these lectures.

### 3.4 Inspecting prison libraries

JPs are charged with protecting the welfare of the prisoners, as evident from their

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<sup>15</sup> For example, Rule 79(2) of the Prison Rules 1999 of the U.K. state: “A member of the board shall have access at any time to every part of the prison and to every prisoner.”

<sup>16</sup> As discussed below in Section 4.2 of this report, Human Rights Monitor finds inappropriate the requirement that the Chief Officer accompany JPs during their visits.

<sup>17</sup> Administration Consultation Paper, at para. 26(b).

duties to inspect the prisoners' diets, advise on employment and occupation, and organize lectures for the moral edification of the prisoners.<sup>18</sup> Another critical aspect of a prisoner's welfare, as recognized in the Standard Minimum Rules, is the maintenance of a library that is well-stocked with books for "recreational and instructional" purposes.<sup>19</sup> The Standard Minimum Rules further require that prisoners shall be provided with information about their rights.<sup>20</sup> Both Section 5 of the Justice of the Peace Ordinance and the relevant section of the Prison Rules regarding the duties of JPs should be supplemented to include the mandatory duty of the JPs to inspect prison libraries and to ensure the availability of materials, in all relevant languages, on legal aid and the rights of prisoners.

### 3.5 Monitoring the punitive implementation of administrative segregation and transfer

The Ombudsman has noted an increasing number of complaints regarding the imposition of administrative segregation under Rule 68B.<sup>21</sup> Human Rights Monitor has observed that there is considerable overlap between the reasons for disciplinary segregation and those for Rule 68B administrative segregation, and is concerned about the punitive use of administrative segregation. Given the lesser due process protections available for the application of Rule 68B and the longer periods of segregation permissible, the use of administrative segregation must be closely monitored. Rule 68B(8) already provides for the JPs to have a role in influencing decision-making about administrative segregation.<sup>22</sup> Both Section 5 of the Justice of the Peace Ordinance and the relevant section of the Prison Rules regarding the duties of JPs should be supplemented to include the mandatory duty of the JPs to inspect prisoners held in Rule 68B segregation and to evaluate whether the circumstances justify the return of the prisoner to normal housing.

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<sup>18</sup> See Rules 230, 232, and 233 of the Prison Rules.

<sup>19</sup> Rule 40 of the Standard Minimum Rules states that "Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it."

<sup>20</sup> Rule 35(1) of the Standard Minimum Rules states that "Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and *all such other matters as are necessary to enable him to understand both his rights and his obligations* and to adapt himself to the life of the institution." (emphasis added)

<sup>21</sup> Ombudsman Report on CSD, at para. 8.4(g).

<sup>22</sup> Rule 68B(8)(b) states that "In deciding whether to order a further removal of a prisoner under paragraph (5) or (6), the Commissioner shall consider ... where any recommendation of visiting justices is available, such recommendation."

Another means of control or punishment is the use of transfer, from a low security facility to a higher security facility or to the Behaviour Adjustment Unit at Siu Lam Psychiatric Centre. Human Rights Monitor has heard of several cases in which prisoners were transferred after soliciting other prisoners to sign a petition, filing complaints against guards, or making frequent requests to see JPs or the Ombudsman.<sup>23</sup> Both Section 5 of the Justice of the Peace Ordinance and the relevant section of the Prison Rules regarding the duties of JPs should be supplemented to include the mandatory duty of the JPs to inquire into the transfer of prisoners to and from a facility and to exchange information with the JPs of the transferor/transferee facilities.

### 3.6 Formulating a standardized questionnaire for use during prison visits

Given the lack of experience and training in prison inspections, a number of JPs may not have a comprehensive understanding of all the potential problems they should take note of or inquire about during a prison visit. Human Rights Monitor recommends that, in addition to receiving training, the JPs should develop a standardized questionnaire identifying major issues or problem areas that they should be aware of during their prison visits. The questionnaire should cover such topics as the conditions of sleeping accommodations, work spaces, sanitation facilities, clothing, and libraries; opportunities for exercise; the availability of medical and dental services; the administration of discipline and punishment; the use of restraints; access to the outside world, including family, friends, and legal counsel; and arrangements for religious observance. The questionnaire should be further tailored to address the particular needs of institutions that hold special populations, such as detention centers for refugees or juvenile homes.

Non-governmental organizations, academics, and other individuals with a specialized knowledge of prison issues (including prison chaplains and the family members and friends of prisoners) should be invited to provide input on the questionnaire. The questionnaire should be reviewed and updated periodically.

## **4. Receiving and investigating complaints**

### 4.1 Submitting written complaints to the JP

The authority of the JPs to receive written complaints is implicit in the Prison

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<sup>23</sup> HRW/Asia & HKHRM Prison Report, at pp. 30-31.

Rules which guarantee the confidentiality of correspondence between prisoners and JPs.<sup>23</sup> Section 5 of the Justice of the Peace Ordinance, which addresses the power of the JPs to visit prisons, should be revised to explicitly provide for the JP's authority to receive and investigate written complaints from prisoners.

The right of prisoners to file complaints without censorship and to receive information about filing complaints is guaranteed by the Standard Minimum Rules.<sup>25</sup> Since JPs do not have the status of public officials, however, a list of their names or their contact information cannot be made available to the public, thereby creating significant obstacles for prisoners who wish to contact JPs independently. As a minimum, the government should consider publicizing a list of the names and contact information of members of the Board for each prison.

Alternatively and preferably, Human Rights Monitor proposes the establishment of a permanent secretariat for the JPs, with a permanent address to which all complaints may be addressed. The staff of the JP Secretariat should be responsible for ensuring all complaints regarding a particular institution or prisoners detained therein will be forwarded to the Board and the visiting JPs who are responsible for that institution. To facilitate the filing of complaints, the JP Secretariat should also prepare a standardized form so that complainants will provide all the relevant information necessary for the JPs to effectively investigate a claim. The CSD should provide prisoners with the address of the JP Secretariat, the standardized complaint form, and other necessary materials.

Human Rights Monitor recommends that the Justice of the Peace Ordinance be amended to establish a JP Secretariat, to provide for adequate staff, facilities, and budget, and to articulate the duties and responsibilities of the Secretariat, as proposed in this Section and elsewhere in this report.

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<sup>24</sup> Rule 47C of the Prison Rules provides that any letter "to a prisoner from, or from a prisoner to, a specified person ... (a) shall not be opened or searched under rule 47A(2) or (8) except in the presence of the prisoner or unless the prisoner indicates that he does not wish to be present; and shall not be read under rule 47A(3) or (4).; and (b) shall not be read under rule 47A(3) or (4)." Rule 1A(g) recognizes a visiting justice as a specified person.

<sup>25</sup> Subparagraph 3 of Rule 36 of the Standard Minimum Rules provides that "Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels." Rule 35 provides that "(1) Every prisoner on admission shall be provided with written information about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.

(2) If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally."

Finally, the Ombudsman has noted that many inmates are from the mainland and may only be able to read simplified Chinese.<sup>26</sup> Thus, any information regarding the filing of complaints with the JPs should also be made available in simplified Chinese text. Given the significant level of illiteracy among inmates, Human Rights Monitor also recommends that information about JPs should also be made available orally in other relevant languages, for example, by means of audio tapes. Furthermore, CSD should provide special assistance to prisoners who wish to file a complaint but may have difficulties with writing.

#### 4.2 Protecting privacy of interviews between the JP and the prisoner

The Standard Minimum Rules require that “[t]he prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer without the director [of the prison] or other members of the [prison] staff being present.” While private interviews with JPs may be arranged with permission by the Superintendent, according to announcements posted in the prisons, in fact, few private interviews are conducted.<sup>27</sup> As reported by the Administration Wing, “[s]ome staff of CSD have insisted on remaining in the same room on security grounds when a complaint is made.”<sup>28</sup> The Ombudsman has noted the need to maintain the confidentiality of interviews between the JPs and the prisoners in order to preserve the “impartiality and credibility of the [JP] system.”<sup>29</sup>

Given the obligatory nature of the duty to preserve the privacy of interviews between the JP and the prisoner, waiver of this right should not be permitted except upon request by the JP or by written consent of the prisoner. Rule 228 of the Prison Rules provides for the JP’s duty to hear complaints during visits. This rule should be amended to guarantee the privacy of interviews between JPs and prisoners.<sup>30</sup>

Rule 117 of the Prison Rules states that “[a]n officer not below the rank of Chief Officer shall accompany the visiting justices in their visits of inspection and bring before them any prisoner who wishes to see them.” Human Rights Monitor

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<sup>26</sup> Annual Report of the Ombudsman of Hong Kong, 1997-98 (hereinafter “Ombudsman Annual Report”), Annex 10, at para. 25.

<sup>27</sup> HRW/Asia & HKHRM Prison Report, at footnote 190.

<sup>28</sup> Administration Consultation Paper, at para. 27.

<sup>29</sup> Ombudsman Annual Report, Annex 10, at para. 32.

<sup>30</sup> For example, Section 228(1) can be amended with the italicized words to read as follows: “Visiting justices shall hear, *in private*, and investigate any complaint which any prisoner or resident of a hostel may desire to make to them.”

recognizes that the presence of the Chief Officer may be necessary for reasons of security; however, his presence should not compromise the privacy of interviews between the JP and the prisoner. While the Prison Rules should maintain the obligations of the Chief Officer to accompany the JP and to bring prisoners who have requested an interview before the JP, the actual interview should be conducted under circumstances that will not jeopardize the privacy of conversations between the JP and the prisoner. For example, the interviews may be conducted within sight but out of the hearing of the Chief Officer and other prison staff.<sup>31</sup> The prisons must also be equipped with appropriate facilities to enable JPs to conduct private interviews.

#### 4.3 Preventing retaliation against prisoners who request interviews with JPs

According to information received by Human Rights Monitor, the right of prisoners to communicate their complaints to visiting JPs is often undermined by the CSD in a number of ways. Prisoners have alleged that they were summoned suddenly for mandatory drug testing at the time of JP visits to prevent them from meeting with the JPs. Others have reported that they were subject to psychological examinations prior to JP visits so that subsequent complaints made to the JPs can be dismissed on the grounds of the unsound mental state of the prisoners. Finally, prisoners also report the use of reprisals against individuals who file complaints with JPs, such as severe punishment for minor infractions, or transfer from a low security facility to a higher security facility or to the Behaviour Adjustment Unit at Siu Lam Psychiatric Centre..<sup>32</sup> These problems affirm the need to have surprise visits by the JPs and to raise awareness among the CSD about international norms on detention, especially with regard to the right of prisoners to file complaints.

A number of procedural mechanisms should be adopted to decrease the likelihood of retaliation against prisoners who file complaints. First, prison officials should provide the JPs with a list of the prisoners who are unavailable during their visit, the reasons for their unavailability, and an indication of whether these individuals have made a prior request to meet with the JPs. Second, when prisoners request an interview with a JP or request information for filing a complaint with a JP,

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<sup>31</sup> This restriction has also been recommended by the Ombudsman. See Ombudsman Annual Report, Annex 10, at para. 34(j).

<sup>32</sup> In an interview with Rick Ying, senior superintendent of the Ma Po Ping Prison on April 2, 1997, a Human Rights Watch/Human Rights Monitor delegation was informed that an inmate was subjected to two extensions of Rule 68B segregation and then transfer to the maximum security Shek Pik Prison because he “had been making frequent requests to see the [JPs] and the Ombudsman.” HRW/Asia & HKHRM Prison Report, at pp. 30-31.

their names should be recorded immediately in a special log. The JPs should inspect this log to verify that during their visit they have interviewed all the prisoners who have requested to see them. Additionally, the JPs should monitor the treatment of the prisoners recorded in the request log over the next 6 to 12 months from the date of the request for an interview, to ensure that the pattern of punishment or treatment of these prisoners does not reveal any retaliatory action taken by the CSD. Finally, when a prisoner indicates that he wishes to make an written or oral complaint to a JP, the CSD should inform him about his right to complain without retaliation, and about procedural mechanisms that he may take if he believes that he has suffered retaliatory measures.

Human Rights Monitor also recommends that any steps taken by a CSD officer against a prisoner in retaliation for filing a complaint should be punished as a disciplinary offence. Rule 239(1) of the Prison Rules, regarding disciplinary offences by officers of the CSD, should be amended accordingly.

#### 4.4 Establishing the right of the public to communicate and file complaints with the JPs

Since JPs must serve as independent monitors of the prisons, the general public should be able to contact JPs directly or through channels which maximize the confidentiality of such communications and minimize the likelihood of government interference. In two instances, however, Human Rights Monitor has observed government zealotry in insulating JPs from the public. In 1997, Human Rights Watch/Asia and Human Rights Monitor released a joint report on prison conditions in Hong Kong and contacted the Administration Wing about making the report available to JPs. Unfortunately, the Administration Wing refused to provide Human Rights Monitor with the contact information of JPs or to provide any other assistance which would facilitate the distribution of the reports to JPs. Similarly, when the Hong Kong University, Faculty of Law organized a seminar in 1998 to discuss Hong Kong's prison system, the Administration Wing again refused to pass information about the seminar on to the JPs. Human Rights Monitor believes that JPs and the public may mutually benefit from the exchange of information and views. Thus, we recommend that the JP Secretariat, proposed in Section 4.1 of this report, should also facilitate communications between the public and the JPs.

Given the inadequacies of safeguards to prevent retaliation against prisoners who make complaints, it is feared that prisoners will continue to remain silent about abuses.

Information about potential abuses may come to the attention of the family members of prisoners, in the course of private conversations, or of non-governmental organizations, in the course of their work. It is therefore important that, in addition to prisoners, the general public has a right to file complaints with the JPs. Notably, Rule 78(3) of the Prison Rules of the U.K. provides that “[t]he [Board of Visitors] shall inquire into any report made to them, whether or not by a member of the board, that a prisoner’s health, mental or physical, is likely to be injuriously affected by any conditions of his imprisonment.” The Prison Rules and the Justice of the Peace Ordinance should be revised to establish the right of the general public, including academics, prison chaplains, non-governmental organizations, and friends and family of prisoners, to file complaints with the JPs and the Board, and the obligation of the JPs to investigate such complaints.

#### 4.5 Strengthening the duty to investigate complaints

The duty of JPs to investigate complaints is established under Rule 228 of the Prison Rules.<sup>33</sup> In practice, however, the JPs often fail to discharge their duty to investigate in a meaningful manner. Generally, JPs refer inmate complaints to the CSD for investigation, and the CSD will subsequently provide the JPs with a brief investigation report. The CSD, instead of the JPs, will also be responsible for informing the complainant of the outcome of the investigation.<sup>34</sup> The JPs should not delegate their responsibility to investigate complaints to the CSD which, as a party with a conflict of interest, may be unable to conduct an impartial investigation.

Rule 228 of the Prison Rules should be amended to establish appropriate procedures for the timely investigation of complaints by JPs. These procedures should include the requirement that the JP speak personally with the complainant and the subject of the complaint, notify the complainant of the outcome of the investigation, and make follow-up inquiries to ensure that retaliatory measures have not been taken against a prisoner for filing a complaint. The JP should be authorized to review all relevant files and documents in the course of his investigation of a complaint. The procedures should also provide for a time period during which investigations must be completed and a mechanism for the review or appeal of the outcome of an investigation. In order to carry out investigations effectively, the JPs should also have a support staff. The JP Secretariat, proposed in Section 4.1 of this

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<sup>33</sup> Rule 228 of the Prison Rules states that “Visiting justices shall hear and investigate any complaint which any prisoner ... may desire to make to them.”

<sup>34</sup> Ombudsman Report on CSD, at para. 7.4(e).

report, may coordinate and assist with JP investigations.

Since 1996, JPs have also been able to refer complaints to the Ombudsman, if they are unsatisfied with the outcome of the CSD investigation. The Ombudsman Ordinance, however, requires that the findings of Ombudsman investigations be kept secret and cannot be revealed to the Justices of the Peace. Consequently, the Ombudsman reports that the “present arrangement is found to have discouraged [visiting JPs] from referring such complaints to the Ombudsman as they will not be informed of the results.”<sup>35</sup>

Human Rights Monitor believes that the Ombudsman should continue to cooperate with JPs in investigating prisoner complaints, given the JPs’ current incapacity to carry out full investigations on their own. It is important, however, that the JPs remain involved in the investigation even after they have referred a complaint to the Ombudsman. Accordingly, Human Rights Monitor recommends that the relevant sections of the Ombudsman Ordinance, including Section 15 (Ombudsman and staff to maintain secrecy”) and Section 17 (“Persons to be informed of result of investigation”), be revised so that a JP may be informed of the outcome of an Ombudsman investigation. For example, Section 17 should be revised so that a JP who refers a prisoner’s complaint to the Ombudsman may also be deemed a “complainant” for the purposes of this section. Section 17(2) provides that “[I]n any case where he conducts an investigation, the Ombudsman shall, unless he has already made a report under section 16(1) to the head of the organization affected, inform [the complainant], in such manner and at such time as he thinks fit, of the result of his investigation.” Human Rights Monitor believes that with regard to prisoner complaints referred to the Ombudsman by a JP, the JP should have the right to be informed promptly of the outcome of an Ombudsman investigation regardless of whether the Ombudsman has already made a report to the CSD Commissioner.

## **5. Establishing a duty to provide periodic reports**

According to Rules 223 and 226 of the Prison Rules, JPs have a duty to record all abuses and recommendations in a log book and to report this information to the Commissioner. During its prison inspections, Human Rights Monitor has noted that the JPs’ comments in the log books have often been superficial and uncritical.<sup>36</sup> As noted by the Ombudsman, “a more detailed report covering major aspects of the visits

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<sup>35</sup> Ombudsman Report on CSD, at para. 7.4(e).

<sup>36</sup> HRW/Asia & HKHRM Prison Report, at pp.46-47.

including any recommendations for improvements and grievances heard and required to be acted upon by CSD...could make a very important resource to enhance prison management.”<sup>37</sup>

Moreover, since JPs only have an obligation to report to the Commissioner, who is the subject of the complaints, there is a little incentive for the Commissioner to take action on the complaints. While the JPs may also communicate this information to the Chief Executive, the obligation to report to the Chief Executive is not mandatory unless they have received information of an injury or a likelihood of injury arising from prison discipline or treatment.<sup>38</sup>

Human Rights Monitor believes that the Boards of Visiting JPs, proposed in Section 3.1 of this report, should be obliged to produce annual reports for each prison detailing the findings from their prison visits, the complaints received from prisoners, the recommendations for improvements, the implementation of such recommendations by the CSD, and any developments relating to the phenomenon of “capture.” The periodic nature of this report would enable JPs to effectively monitor improvements in prison administration and identify areas where continued attention is required. The Boards may also produce interim or special reports throughout the year, to address any special developments or issues that are deserving of immediate attention.

Transparency and publicity will be critical in maximizing the effectiveness of the JP reports. Thus, the annual reports of the Boards should not only be submitted to the Commissioner, but also to the relevant panels of the Legislative Council and to the general public. At the presentation of the annual reports to the Legislative Council, the public should also be given an opportunity to comment on the report.

## **6. Establishing a duty to inspect other detention facilities**

Section 5(1) of the Justice of the Peace Ordinance empowers the JPs to “visit any custodial institution or detained person.” Currently, JPs only visit penal institutions and the centres for Vietnamese refugees. According to the Administration Wing Consultation Paper, there have been suggestions to extend the JP system to include

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<sup>37</sup> Ombudsman Report on CSD, at para. 7.4(g).

<sup>38</sup> Rule 227 of the Prison Rules only require the JPs to furnish information “as may be required by the Chief Executive from time to time.” Rule 229 requires that JPs who receive reports of injury or potential injury arising from discipline or treatment “shall communicate their opinion to the Chief Executive.”

inspections of welfare institutions such as homes for the aged.<sup>39</sup>

Human Rights Monitor agrees that there are a number of institutions that would benefit from inspection and monitoring by JPs. In addition to homes for the aged, JPs should also consider examining the detention facilities operated by the Immigration Department, the Custom and Excise Department, the Social Welfare Department, and the Independent Commission Against Corruption. Human Rights Monitor emphasizes, however, that the systemic reforms proposed in this report should be implemented to enhance the effectiveness of prison inspections before any further expansion of the current JP system can be undertaken.

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<sup>39</sup> Administration Consultation Paper, para. 33-34.

## APPENDIX 1

### STATUTORY INSTRUMENTS 1999 NO. 728

#### THE PRISON RULES 1999

Made 10<sup>th</sup> March 1999, Laid before Parliament 11<sup>th</sup> March 1999, Went into force 1<sup>st</sup> April 1999

#### Part V: Board of Visitors

##### *Disqualification for membership*

74. Any person, directly or indirectly interested in any contract for the supply of goods and services to a prison, shall not be a member of the board of visitors for that prison and any member who becomes so interested in such a contract shall vacate office as a member.

##### *Board of visitors*

75. (1) A member of the board of visitors for a prison appointed by the Secretary of State under section 6(2) of the Prison Act 1952[15] shall subject to paragraphs (3) and (4) hold office for three years, or such lesser period as the Secretary of State may appoint.

(2) A member -

(a) appointed for the first time to the board of visitors for a particular prison; or

(b) reappointed to the board following a gap of a year or more in his membership of it,

shall, during the period of 12 months following the date on which he is so appointed or (as the case may be) reappointed, undertake such training as may reasonably be required by the Secretary of State.

(3) The Secretary of State may terminate the appointment of a member if he is satisfied that

(a) he has failed satisfactorily to perform his duties;

(b) he has failed to undertake training he has been required to undertake under paragraph (2), by the end of the period specified in that paragraph;

(c) he is by reason of physical or mental illness, or for any other reason, incapable of carrying out his duties;

(d) he has been convicted of such a criminal offence, or his conduct has been such, that it is not in the Secretary of State's opinion fitting that he should remain a member; or

(e) there is, or appears to be or could appear to be, any conflict of interest between the member performing his duties as a member and any interest of that member, whether personal, financial or otherwise.

(4) Where the Secretary of State:

(a) has reason to suspect that a member of the board of visitors for a prison may have so conducted himself that his appointment may be liable to be terminated under paragraph (3)(a) or (d); and

(b) is of the opinion that the suspected conduct is of such a serious nature that the member cannot be permitted to continue to perform his functions as a member of the board pending the completion of the Secretary of State's investigations into the matter and any decision as to whether the member's appointment should be terminated,

he may suspend the member from office for such period or periods as he may reasonably require in order to complete his investigations and determine whether or not the appointment of the member should be so terminated; and a member so suspended shall not, during the period of his suspension, be regarded as being a member of the board, other than for the purposes of this paragraph and paragraphs (1) and (3).

(5) A board shall have a chairman and a vice chairman who shall be members of the board.

(6) The Secretary of State shall -

(a) upon the constitution of a board for the first time, appoint a chairman and a vice chairman to hold office for a period not exceeding twelve months;

(b) thereafter appoint, before the date of the first meeting of the board in any year of office of the board, a chairman and vice chairman for that year, having first consulted the board; and

(c) promptly fill, after first having consulted the board, any casual vacancy in the office of chairman or vice chairman.

(7) The Secretary of State may terminate the appointment of a member as chairman or vice chairman of the board if he is satisfied that the member has -

(a) failed satisfactorily to perform his functions as chairman (or as the case may be) vice chairman;

(b) has grossly misconducted himself while performing those functions.

*Proceedings of boards*

76. (1) The board of visitors for a prison shall meet at the prison once a month or, if they resolve for reasons specified in the resolution that less frequent meetings are sufficient, not fewer than eight times in twelve months.

(2) The board may fix a quorum of not fewer than three members for proceedings.

(3) The board shall keep minutes of their proceedings.

(4) The proceedings of the board shall not be invalidated by any vacancy in the membership or any defect in the appointment of a member.

*General duties of boards*

77. (1) The board of visitors for a prison shall satisfy themselves as to the state of the prison premises, the administration of the prison and the treatment of the prisoners.

(2) The board shall inquire into and report upon any matter into which the Secretary of State asks them to inquire.

(3) The board shall direct the attention of the Chief Executive to any matter which calls for his attention, and shall report to the Secretary of State any matter which they consider it expedient to report.

(4) The board shall inform the Secretary of State immediately of any abuse which comes to their knowledge.

(5) Before exercising any power under these Rules the board and any member of the board shall consult the Chief Executive in relation to any matter which may affect discipline.

*Particular duties*

78. (1) The board of visitors for a prison and any member of the board shall hear any complaint or request which a prisoner wishes to make to them or him.

(2) The board shall arrange for the food of the prisoners to be inspected by a member of the board at frequent intervals.

(3) The board shall inquire into any report made to them, whether or not by a member of the board, that a prisoner's health, mental or physical, is likely to be injuriously affected by any conditions of his imprisonment.

*Members visiting prisons*

79. (1) The members of the board of visitors for a prison shall visit the prison frequently, and the board shall arrange a rota whereby at least one of its members visits the prison between meetings of the board.

(2) A member of the board shall have access at any time to every part of the prison and to every prisoner, and he may interview any prisoner out of the sight and hearing of officers.

(3) A member of the board shall have access to the records of the prison.

*Annual report*

80. (1) The board of visitors for a prison shall, in accordance with paragraphs (2) and (3) below, from time to time make a report to the Secretary of State concerning the state of the prison and its administration, including in it any advice and suggestions they consider appropriate.

(2) The board shall comply with any directions given to them from time to time by the Secretary of State as to the following matters:

(a) the period to be covered by a report under paragraph (1);

(b) the frequency with which such a report is to be made; and

(c) the length of time from the end of the period covered by such a report within which it is to be made;

either in respect of a particular report or generally; providing that no directions may be issued under this paragraph if they would have the effect of requiring a board to make or deliver a report less frequently than once in every 12 months.

(3) Subject to any directions given to them under paragraph (2), the board shall, under paragraph (1), make an annual report to the Secretary of State as soon as reasonably possible after 31st December each year, which shall cover the period of 12 months ending on that date or, in the case of a board constituted for the first time during that period, such part of that period during which the board has been in existence.