

For information
3 July 2007

**Bills Committee on the
Statute Law (Miscellaneous Provisions) Bill 2007**

**Amendments to the Public Order Ordinance (Cap. 245)
and the Societies Ordinance (Cap. 151)**

Purpose

At the Bills Committee meeting on 16 June 2007, a number of parties¹ offered their comments on the proposed amendments to the Public Order Ordinance (POO) (Cap. 245) and Societies Ordinance (SO) (Cap. 151), as well as the operation of the POO in general. A Member also asked for information on the interpretation of the term “protection of rights and freedoms of others”. This paper provides the Administration’s response.

Proposed amendments to POO and SO

2. In the Statute Law (Miscellaneous Provisions) Bill 2007 (the Bill), the Administration proposes, inter alia, severing “public order (in the law and order sense)” from “public order (*ordre public*)” in the relevant sections of the POO and SO. We note that none of the deputations / parties concerned has raised particular objection to the proposed amendments per se. In particular, we note that the Hong Kong Bar Association and the Law Society of Hong Kong have confirmed that the amendments are in line with the Court of Final Appeal (CFA)’s judgment in the case “*Leung Kwok Hung & Others v HKSAR*”.

Other comments raised

3. In their written submissions as well as at the Bills Committee meeting on 16 June 2007, the deputations also raised a number of other comments relating to the POO in general. As the Administration pointed out at the meeting, these comments are outside the scope of the Bill. We would suggest that they be dealt with separately. In the meantime, a note setting out the Administration’s position on the broad issues raised is at **Annex A** for Members’ reference.

¹ Deputations included the Hong Kong Bar Association, Law Society of Hong Kong, Hong Kong Human Rights Monitor, Hong Kong Human Rights Commission, Amnesty International Hong Kong, and Hong Kong Federation of Students. A submission was also received from Mr LO Wai-ming.

“Rights and freedoms of others”

4. The term “protection of rights and freedoms of others” is explained in “*Guidelines on the approach to the Public Order Ordinance in relation to public meetings and public processions*”, which have previously been provided to the Panel on Security. For Members’ ease of reference, the relevant extract is at **Annex B**.

**Security Bureau
Hong Kong Police Force
Department of Justice
June 2007**

**The Administration's position on some issues
related to the Public Order Ordinance (Cap. 245)**

Comments of the United Nations Human Rights Committee (UNHRC) on
the Public Order Ordinance (POO)

People in Hong Kong have the freedom of assembly, freedom of demonstration etc., as guaranteed by Article 27 of the Basic Law (BL27) and Article 17 of the Hong Kong Bills of Rights. This is confirmed by the Court of Final Appeal (CFA) in the case of *Yeung May-wan & Others v HKSAR*, which held that the freedoms protected by BL27 were at the heart of Hong Kong's system. We note the comments of the UNHRC on the POO, as set out in their concluding observations of November 1999 on the first periodic report submitted by Hong Kong in respect of its implementation of the International Covenant on Civil and Political Rights. The Administration in fact gave a full response to the UNHRC's comments in our second periodic report issued in January 2005 and the supplementary information provided to the UNHRC in March 2006. (Please see **Appendices A and B** respectively for details.)

Specific comments on the POO

2. We note the various specific suggestions to change the POO, e.g. to relax the number of event participants that require notification to the Police, to relax the notification deadline, to streamline the notification procedures, to require the Police to give their notice of objection / no objection at an earlier stage, to vest the power to prohibit / object to notifications in the court, etc. Most, if not all, of these suggestions have in fact been deliberated over in the past and the Administration's position on them is set out in our various submissions to the UNHRC (paragraph 1 above) as well as to the Legislative Council in the debate on the POO in December 2000.

3. As pointed out by the CFA in *Leung Kwok Hung & Others v HKSAR* (the case), the right of peaceful assembly involves a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies and demonstrations to take place peacefully. It also confirmed that notification is required to enable the Police to fulfill this positive duty. We consider that the current regime under the POO is both necessary and proportionate in that it strikes a correct balance between the need to protect the individual's right of

peaceful assembly, of demonstration, etc. on the one hand, and the interests of the community at large on the other.

Judgment of Mr Justice Bokhary PJ in the case

4. Some deputations have quoted the dissenting judgment of Mr Justice Bokhary PJ in the case. As pointed out in the Administration's paper "The Court of Final Appeal's Judgment on *Leung Kwok Hung & Others v HKSAR*", which was discussed by the Panel on Security at its meeting on 1 November 2005, Mr Justice Bokhary PJ's view is a minority view and is *obiter dictum* and not the *ratio decidendi* of the case. In other words, a considerable part of his judgment covers matters not directly forming the rationale behind the court's judgment. It should be borne in mind that this dissenting judgment is not the opinion of the court and, in that light, not a decision in the case.

Applying the POO

5. As we pointed out at the Bills Committee meeting on 16 June 2007, the Administration has issued "*Guidelines on the approach to the Public Order Ordinance in relation to public meetings and public processions*". The guidelines explain the meaning of many important terms used in the POO, and are available on the Police's website and in Divisional Police Report Rooms for inspection.

**Security Bureau
Hong Kong Police Force
Department of Justice
June 2007**

Appendix A

Extract from the second periodic report on the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights

Paras. 214 to 224

Article 21: Right of peaceful assembly

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

215. At the constitutional level, Article 27 of the Basic Law guarantees the freedom of association, of assembly, of procession and of demonstration. Article 17 of the Hong Kong Bill of Rights gives domestic effect to the provisions of Article 21 of the Covenant. The provisions of the Public Order Ordinance in respect of the right to assembly were specifically framed with a view to conformity with Article 21 of the Covenant. All decisions made under that Ordinance are subject to the Basic Law, Article 39 of which enshrines the provisions of the Covenant as applied to Hong Kong.

216. As the Committee has rightly noted, demonstrations continue to be an integral part of daily life in Hong Kong. Between 1 July 1998 and 30 June 2003, there were some 11,461 public meetings and processions. The Police have only prohibited or objected to 21 such events on the grounds of public safety, public order and protection of the rights and freedoms of others. Nine of the events eventually took place after modifications of the route, venue or scale. If proof were needed that freedom of assembly is alive and well in the HKSAR, the large procession, of variously estimated at 350,000 to 500,000 people, on 1

July 2003 surely provides that. To emphasise the point, a survey conducted by the University of Hong Kong (also in July 2003) revealed a public rating of 7.49 marks out of a maximum 10 for the ‘freedom of procession and demonstration’: a record high.

The operation of the Public Order Ordinance

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

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

218. The Police apply three levels of response to breaches of the Public Order Ordinance -

- (a) at peaceful events, where there are technical or unplanned breaches: a verbal warning will be given to the person in charge of the event. Details will be recorded and the event allowed to proceed;
- (b) at peaceful events where the organiser has deliberately breached the law or disobeyed the lawful orders given by the Police: the Police will issue verbal warnings to the persons in charge, informing them that that they consider possible prosecution action. Evidence of offences committed will be collected and presented to the Department of Justice, which will consider whether or not to prosecute; and
- (c) at events where there are potential or actual breaches of the peace: the Police will verbally warn both the persons in charge and other participants, directing them immediately to cease any unlawful activity. If the warnings are ignored, the Police will, as appropriate, consider peaceful dispersal, physical removal of the crowd, or arrest. Evidence of any unlawful activity will be collected and legal advice will be sought after the event as to whether to initiate prosecution.

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

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

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

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

- (a) some commentators consider that the notice period prescribed in sections 8 and 13A (normally seven days) unnecessarily restricts the right of peaceful assembly. But the Ordinance provides the safeguard that, if the Commissioner of Police is reasonably satisfied that earlier notice could not have been given, he must accept such shorter notice and must give his reasons if he does not so accept¹. Thus, the ‘normal’

¹ The relevant provisions are sections 8(2) & (3) and 13A(2) & (3) -
“(2)Notwithstanding subsection (1), the Commissioner of Police may, *and shall in any case where he is reasonably satisfied that earlier notice could not have been given*, accept shorter notice than is specified in that subsection. [*Editor’s emphases.*]
(3)In cases where the Commissioner of Police has decided not to accept shorter notice than is specified in subsection (1), he shall as soon as is reasonably practicable inform in writing the person purporting to give the notice of his decision and the reasons why the shorter notice is not acceptable.”

notification period of seven days must be, and is, applied with flexibility and reason. The seven-day period is partly required to allow the Appeal Board time to meet and consider appeals on any conditions imposed on a peaceful demonstration. See (d) below;

- (b) the power of the Commissioner of Police to object to a procession is provided for in section 14. But this power is subject to section 14(3), which prescribes time limits within which he must notify the organisers of his decision. That is, if he objects to the procession, he must issue a notice of objection as soon as is reasonably practicable and within the specified time limit (48 hours before the commencement time of the procession if seven days' notice is given). If he does not so object, he must issue a notice of no objection as soon as is reasonably practicable and within the same time limit. If he does not issue either a notice of no objection or a notice of objection within the time limit, he is taken to have issued a notice of no objection and the procession can proceed;
- (c) there are further safeguards in sections 9 and 14, which provide that the Commissioner may only prohibit a public meeting or object to a public procession if he reasonably considers that the prohibition or objection is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others. He cannot prohibit a public meeting or object to a public procession if he reasonably considers that the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others could be met by imposing conditions;
- (d) under section 16, the Commissioner's decisions are subject to appeal to the Appeal Board on Public Meetings and Processions. The Board comprises a retired judge and persons who are not public officers; and
- (e) as a matter of Hong Kong constitutional law, if the powers in the Public Order Ordinance were exercised in ways inconsistent with Article 21 of the Covenant as incorporated by Article 17 of the Hong Kong Bill of Rights, the decision(s) in question would be unlawful and in breach of Article 39 of the Basic Law. They could therefore be quashed by the courts.

223. In the last few months of 2000, there was extensive public discussion about the provisions of the Public Order Ordinance and whether they required amendment. Some commentators considered that the freedom of peaceful assembly should not be subject to any form of regulation, and that the Public Order Ordinance should be reviewed. Others considered that the existing provisions struck a reasonable balance between the individual's rights to freedom of expression and peaceful assembly and the broader community interest in respect of public safety, public order, and so forth.

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

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² On 20 and 21 December 2000.

Appendix B

Extract from Government of the Hong Kong Special Administrative Region's response to the list of issues presented by the Human Rights Committee on 7 November 2005

Question 14

14. Please comment on information before the Committee that police authorities have used the “notice of no objection” procedure under the Public Order Ordinance to make it more difficult for groups to obtain permissions for marches, demonstrations, and rallies, and to arrest journalists and students during peaceful protests. Please elaborate on the conditions and/or penalties imposed on such protestors. What types of application for public demonstrations have been rejected for reasons of “national security,” “public order,” or their subject matter?

Reply

14.1 The ‘notice of no objection’ procedure has not been used to hinder groups from engaging in peaceful protest. Demonstrations remain an integral part of daily life here, as is clearly shown by the number of marches, demonstrations and rallies that regularly take place: some 18,534 between July 1997 and December 2005. During this period, the Police have raised objections on only 21 occasions, nine of which subsequently took place after the organizers had revised their routing, venue, or scale. The remaining 12 were either called-off, or their size was scaled down to such a level that the events were no longer notifiable. Some were cancelled after appeals were dismissed by the Appeal Board on Public Meetings and Processions, an independent appeal mechanism established under section 43 of the Ordinance. No application for public demonstration has been objected to on the ground of its subject-matter, national security or otherwise.

14.2 We explained the operation of the Public Order Ordinance (Cap. 245) - including the “notice of no objection” system - and addressed related concerns in paragraphs 376 to 381 of the initial report and paragraphs 214 to 224 of the second report.

14.3 The freedoms of association, of assembly, of procession and of demonstration are guaranteed under both Article 27 of the Basic Law (BL 27) and Article 17 of the Hong Kong Bill of Rights. Article 17 of the Hong Kong Bill of Rights gives domestic legal effect to Article 21 of the Covenant. In *Yeung May-wan & others v Hong Kong Special Administrative Region*¹¹, the Court of Final Appeal (CFA) held that the freedoms protected by BL 27 were at the heart of Hong Kong's system. However, the law required reasonable give and take between users of public places. In *Leung Kwok Hung & others v Hong Kong Special Administrative Region*¹², the CFA observed that the right of peaceful assembly involved a positive duty on the part of the Government to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. It also accepted the need to have a reasonable and proportionate notification procedure which can be applied responsibly and with a right to review that can only enhance and not restrict the relevant freedoms. We are guided by those judgments.

14.4 It must be stressed that the 'notice of no objection' system is a notification system, not a permit system. The Public Order Ordinance provides that a public meeting/procession at which the attendance exceeds the prescribed limits may take place if notice has been given in accordance with the requirements of the Ordinance and that the Commissioner of Police has not prohibited or objected to it. The Commissioner carefully examines each case and will not lightly exercise her/his discretion by objecting to or by imposing conditions on notified public order event. And he must state the grounds of any such prohibition/objection or imposition of conditions by way of written notice.

14.5 The Commissioner has the discretion to restrict the right of a peaceful assembly by imposing conditions on a notified public order event. In deciding whether and if so what restriction(s) to impose in the exercise of his discretion, she/he must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes and whether the potential restriction is no more than is necessary to accomplish the legitimate purpose. In short, she/he must consider whether the restriction is proportionate.

¹¹ [2005] 2 HKLRD 212.

¹² [2005] 3 HKLRD 164.

14.6 So far, proceedings for failure to give prior notification have been instituted on only two occasions. The legal proceedings relating to the first case were concluded in July 2005, the offenders being bound over in a sum of \$500 for three months. The second case will be heard in early 2006. These prosecutions are the only relevant ones since the enactment of the current Public Order Ordinance in July 1997.

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Extract from “*Guidelines on the approach to the Public Order Ordinance in relation to public meetings and public processions*”

“Protection of Rights and Freedoms of Others”

13. In the context of the Commissioner’s statutory discretion to restrict the right of peaceful assembly, the term ‘the protection of the rights and freedoms of others’ refers to –

- the protection of the rights of passers-by, as well as those of the participants, to personal safety and physical integrity, which were dealt with in the context of public safety; and
- the protection of private property of others including private commercial interests.⁶

14. Scenarios upon which the Commissioner of Police may, in his discretion, limit the right to freedom of assembly on the ground of ‘rights and freedoms of others’ would, for example, be :

- (i) the procession will result in unreasonable disruption of normal business and mercantile operations along, or in the vicinity of, the proposed procession route; and
- (ii) the concentration of persons, vehicles or things at the formation and dismissal areas, along the procession route and in nearby areas, will prevent necessary fire and police protection or other emergency services.

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⁶ *U.N. Covenant on Civil and Political Rights CCPR Commentary*, Dr. Manfred Nowak, at p. 382-383.