

**Report on the Hong Kong
Special Administrative Region
under the Convention Against Torture
and Other Cruel, Inhuman or
Degrading Treatment or Punishment**

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Preface

Background

In June 1997, China's Permanent Representative to the United Nations notified the United Nations Secretary-General that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would continue to apply to the Hong Kong Special Administrative Region (HKSAR) with effect from 1 July 1997 and that the Central People's Government (CPG) would assume responsibility for the international rights and obligations arising from the application of the Convention to the Region. This report on the HKSAR in the light of Article 19 of the Convention is submitted in accordance with that responsibility.

2. Having regard to the fact that the last report on Hong Kong was submitted by the Government of the United Kingdom and subsequently considered by the Committee in November 1995, the purpose of this introductory section is to inform the Committee of certain significant developments between the date of its hearing and 30 June 1997 - a period during which the CPG was not responsible for the rights and obligations arising from the application of the Convention to Hong Kong.

General

3. The position remains essentially as described in the last report on Hong Kong. The framework of legal protections (the rule of law, the Bill of Rights Ordinance, judicial independence, and legislation creating offences of torture and providing for surrender of persons for these offences: paragraph 4(a) below) remains in place. Indeed, it has been strengthened by the constitutional protections in the Basic Law, Article 39 of which provides that the 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 and shall be implemented through the laws of the HKSAR¹. However, there were also developments that took place before 1 July 1997 that were relevant to the implementation of the Convention in the HKSAR. These are explained below.

Developments between November 1995 and 30 June 1997

4. There were two developments of note -
 - (a) **the Fugitive Offenders Ordinance and the Fugitive Offenders (Torture) Order - amendment to the Crimes (Torture) Ordinance:** Part II of the Crimes (Torture) Ordinance (Chapter 427) enabled Hong Kong to surrender persons to jurisdictions that were parties to the Torture Convention for offences of torture pursuant to United Kingdom extradition legislation. In June 1997, Part II of the Ordinance was repealed and replaced by the Fugitive Offenders (Torture) Order (Chapter 503I): text at Annex 2. This is subordinate legislation made pursuant to the Fugitive Offenders Ordinance (Chapter 503) at Annex 3. The combined effect of the Ordinance and the Order is to permit the HKSAR to surrender persons to parties to the Torture Convention for offences of torture.
 - (b) **Vietnamese refugees and migrants:** in paragraph 15 of their concluding observations on the 1995 report, the Committee expressed concern about “the standards of detention of the Vietnamese boat people in Hong Kong”. The present position is discussed in paragraphs 33 to 37 of this report in relation to Article 3. Essentially, Hong Kong is no longer a Port of First Asylum for persons leaving Vietnam. Almost all the Vietnamese migrants formerly detained in Hong Kong holding centres have returned to Vietnam. The last

¹ This provision is made in the first paragraph of Article 39. The second paragraph provides that the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law, and that such restrictions shall not contravene the provisions of the preceding paragraph. The full text of the Basic Law is at Annex 1 of this report.

detention centre for Vietnamese migrants was closed in May 1998. The 640 now remaining (whose situation is explained in paragraph 34 in relation to Article 3) have been released on recognisance. Like the 1,060 remaining refugees, they are allowed to seek employment and seek their own accommodation. Most of the migrants and about half the refugees live in an open centre (Pillar Point) operated by the UNHCR. They have access to medical, social and educational services. Like illegal immigrants from other places, persons from Vietnam who entered Hong Kong in search of illegal employment are held in custody pending repatriation. The institution where they are held conforms with UN minimum standards.

Part I

General Profile of the Hong Kong Special Administrative Region

LAND AND PEOPLE

Background statistical information, using the most up-to-date figures available, is as follows -

(a) Population by sex

<u>Sex</u>	<u>Mid 1987</u> (million)	<u>Mid 1992</u> (million)	<u>Mid 1998</u> (million)
Male	2.9	2.9	3.4
Female	2.7	2.9	3.3
Total	5.6	5.8	6.7

(b) Population by age group and sex

<u>Age</u>	<u>Sex</u>	<u>Percentage of total population</u>		
		<u>Mid 1987</u>	<u>Mid 1992</u>	<u>Mid 1998</u>
Under 15	Male	11.7	10.6	9.0
	Female	10.8	9.9	8.4
15-64	Male	36.3	36.2	36.5
	Female	33.2	34.2	35.6
65 and over	Male	3.4	4.0	4.8
	Female	4.5	5.0	5.7
All age groups	Male	51.4	50.8	50.4
	Female	48.6	49.2	49.6

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

<u>Educational attainment</u>	<u>Sex</u>	<u>Percentage</u>		
		<u>1986</u>	<u>1991</u>	<u>1996</u>
No schooling/kindergarten	Male	3.6	3.6	2.5
	Female	10.5	9.1	7.0
Primary	Male	15.8	13.2	11.2
	Female	13.5	12.0	11.4
Secondary and above	Male	31.8	33.8	35.8
	Female	24.8	28.2	32.1

(d) Literacy rate (1984) : 88.4% (1996) : 90.5%

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

<u>Usual language/dialect</u>	<u>Percentage</u>	
	<u>1991</u>	<u>1996</u>
Cantonese	88.7	88.7
Putonghua	1.1	1.1
Other Chinese dialects	7.0	5.8
English	2.2	3.1
Others	1.0	1.3
	<u>100.0</u>	<u>100.0</u>

(f) Crude birth and death rates

	<u>1987</u>	<u>1992</u>	<u>1997</u>
Crude birth rate (per 1, 000 population)	12.6	12.3	9.1
Crude death rate (per 1, 000 population)	4.8	5.3	4.9

(g) Expectation of life at birth (Number of years)

<u>Sex</u>	<u>1987</u>	<u>1992</u>	<u>1997</u>
Male	74.2	74.8	76.8
Female	79.7	80.7	82.2

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

<u>1987</u>	<u>1992</u>	<u>1997</u>
7.4	4.8	3.9

(i) Maternal mortality rate (Number of deaths per 100, 000 total births)

<u>1987</u>	<u>1992</u>	<u>1997</u>
4.3	5.5	1.6

(j) Fertility rate

	<u>1987</u>	<u>1992</u>	<u>1997</u>
General fertility rate (per 1, 000 women aged 15-49) excluding female foreign domestic helpers	47.9	46.3	33.5

(k) Percentage of household heads by sex

<u>Sex</u>	<u>1986</u>	<u>1991</u>	<u>1996</u>
Male	73.0	74.3	72.8
Female	27.0	25.7	27.2

(l) Unemployment rate
(averages of the estimates obtained from the quarterly General Household Surveys of the year)

<u>1987</u>	<u>1992</u>	<u>1997</u>
1.7	2.0	2.2

(m) Rate of inflation

(i) Composite Consumer Price Index

<u>Year</u>	<u>Annual rate of increase in CPI(%)</u>
1990	10.2
1991	11.6
1992	9.6
1993	8.8
1994	8.8
1995	9.1
1996	6.3
1997	5.8

Note : The Composite CPI is compiled on the basis of expenditure patterns of about 90% of households in the HKSAR, which had an average monthly expenditure of HK\$4,000 - HK\$59,999 during the base period of October 1994 - September 1995. This approximately corresponds to a monthly expenditure range of HK\$4,600 - HK\$69,200 at 1997 prices.

(ii) Implicit price deflators of Gross Domestic Product[#]

Deflator Year	(1990 = 100)	Annual Rate of change (%)
1990	100.0	7.5
1991	109.2	9.2
1992	119.8	9.7
1993	130.0	8.5
1994	139.0	6.9
1995	142.5	2.5
1996	150.2	5.4
1997	159.0	5.9

(n) Gross Domestic Product for 1990 - 1997[#]

Year	At current market prices (US\$ Mn)	At constant (90) market prices (US\$ Mn)
1990	74,791	74,791
1991	86,027	78,756
1992	100,676	84,013
1993	116,011	89,222
1994	130,808	94,139
1995	139,238	97,703
1996	154,171	102,622
1997	171,406	107,796

(o) Per capita income

(Per capita GDP for 1990-1997#)

<u>Year</u>	<u>At current market prices (US\$)</u>	<u>At constant (90) market prices (US\$)</u>
1990	13,111	13,111
1991	14,956	13,692
1992	17,357	14,484
1993	19,660	15,120
1994	21,674	15,598
1995	22,618	15,871
1996	24,429	16,261
1997	26,362	16,579

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

* Provisional figure

GDP figures refer to the estimates released in March 1998

GENERAL POLITICAL STRUCTURE

Constitutional document

2. In accordance with the provisions of Article 31 and sub-paragraph 13 of Article 62 of the Constitution of the People's Republic of China (PRC), as well as the relevant decisions of the National People's Congress (NPC) adopted at the Third Session of the Seventh NPC on 4 April 1990, the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR) was established on 1 July 1997. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China was also put into effect on 1 July 1997. Under the principle of "One Country, Two Systems", the socialist system and policies are not practised in the HKSAR and Hong Kong's previous capitalist system and way of life will remain unchanged for 50 years. A copy of the Basic Law is at Annex 1.

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

4. Among other matters, the Basic Law provides that -

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

- (b) the executive authorities and legislature of the HKSAR shall be composed of permanent residents of Hong Kong;
- (c) the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravenes the Basic Law, and subject to any amendment by the legislature of the HKSAR;
- (d) national laws shall not be applied in the HKSAR except for those listed in Annex III to the Basic Law and that the laws listed therein shall be applied locally by way of promulgation or legislation by the Region. The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting the Committee for the Basic Law of the HKSAR and the HKSAR government;
- (e) the HKSAR is authorised to conduct external affairs on its own. The HKSAR may on its own, using the name "Hong Kong, China", maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organisations in the appropriate fields, including economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields;
- (f) the HKSAR remains a free port, a separate customs territory and an international financial centre. There shall be free flow of capital. HKSAR issues and manages its own currency;
- (g) the HKSAR formulates its own policies on the development of education, science, culture, sports, labour and social services, and Hong Kong residents have the freedom of religious belief;

- (h) Hong Kong residents enjoy a wide range of freedoms and rights and this will be further dealt with under the section of “General Legal Framework Within Which Human Rights Are Protected”; and
- (i) the provisions of the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and international labour conventions as applied to Hong Kong shall remain in force.

System of Government

General structure

5. The Chief Executive of the HKSAR is the head of the Region. An Executive Council assists him in policy-making. The Legislative Council of the HKSAR is the legislature of the Region - it legislates, controls public expenditure and raises questions on the work of the government. The method for the formation of the Legislative Council is stipulated in the Basic Law and the “Decision on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR” adopted at the Third Session of the Seventh NPC on 4 April 1990. The method for formation of the district organisations, including the municipal councils and district boards are prescribed by law.

Chief Executive

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

7. The first Chief Executive was selected in accordance with the NPC's "Decision on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR". A Selection Committee was formed to recommend a candidate to the Central People's Government for appointment. The Selection Committee comprised 400 members from various sectors of the community. In future, the Chief Executive will be elected by an Election Committee composing of 800 members.

8. Annex I of the Basic Law further provides that amendments to the method for selecting the Chief Executive for the terms subsequent to the year 2007 may be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive. Any such amendments are to be reported to the Standing Committee of the NPC for approval. Article 45 of the Basic Law provides that the ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

Executive Council

9. Members of the Executive Council of the HKSAR are appointed by the Chief Executive from among the principal officials of the executive authorities, members of the Legislature Council and public figures. Their appointment or removal shall be decided by the Chief Executive. The total number of these appointed members is not specified. At present, there are 14 members.

10. The Council normally meets once a week. The Chief Executive presides over its meetings. He is required by Article 56 of the Basic Law to consult the Executive Council before making important policy decisions and introducing bills to the Legislative Council. Members tender their advice on an individual basis, but the Council's conclusions are presented as collective decisions.

Legislative Council

11. Article 68 of the Basic Law provides that the HKSAR Legislative Council shall be constituted by election. The method for its formation shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The composition of the Legislative Council in its first three terms will be as follows -

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

12. Basic Law Annex II further provides that amendments to the method for forming the Legislative Council after 2007 may be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive. Any such amendments are to be reported to the Standing Committee of the NPC for the record. According to Article 68 of the Basic Law, the ultimate aim is the election of all the members of the Legislative Council by universal suffrage.

13. According to Article 73 of the Basic Law, the powers and functions of the Legislative Council include enactment, amendment or repeal of laws in accordance with the provisions of the Basic Law and legal procedures; examining and approving budgets introduced by the government; approving taxation and public expenditure; receiving and debating the policy addresses of the Chief Executive; raising questions on the work of the government; debating any issue concerning

public interests; endorsing the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court; and receiving and handling complaints from Hong Kong residents. The Council is also empowered to impeach the Chief Executive under certain prescribed circumstances.

Municipal Councils

14. The Municipal Councils comprise the Urban Council and the Regional Council. The two bodies operate at the regional level and respectively provide “municipal services” in the urban areas and the New Territories. These services include maintaining environmental hygiene, protecting public health, providing facilities and programmes for sports, recreation, culture and entertainment. The Councils are statutory bodies and are financially autonomous.

District Boards

15. The District Boards are statutory bodies established to provide a forum for public consultation and participation at the district level. They play an advisory role with substantial responsibility for the management of district affairs and community halls. They discuss a wide range of matters affecting the well-being of residents in their districts and recommend appointments to the various local bodies. They are also allocated public funds for undertaking cultural and recreational activities for local communities and for minor environmental improvement works.

Provisional Legislative Council, Provisional Municipal Councils and Provisional District Boards

16. The former legislature of Hong Kong established under British rule ceased to exist on 1 July 1997 after the then existing constitutional instruments had lapsed when the People’s Republic of China resumed exercising sovereignty over Hong Kong. In preparation for the establishment of the HKSAR, the Preparatory Committee had, on 24 March 1996, decided to establish the Provisional Legislative

Council to perform specified tasks to enable the business of Government to continue before elections could be held to form the first Legislative Council of the HKSAR.

17. The Provisional Legislative Council comprised 60 members who were elected by the Selection Committee for the First Government of the HKSAR on 21 December 1996. Major tasks of the Council were to enact laws which were essential for the normal operation of the HKSAR; to amend and repeal laws where necessary in accordance with the Basic Law; examine and approve budgets introduced by the government; approve taxation and public expenditure; receive and debate the policy addresses of the Chief Executive; and endorse the appointment of the judges of the Court of Final Appeal and the Chief Judge of the High Court. The term of office of the Council members expired on 30 June 1998.

18. The former Municipal Councils and District Boards established under British rule were dissolved on 30 June 1997. In preparation for the establishment of the HKSAR, the Preparatory Committee had, on 1 February 1997, decided that provisional district organisations including the Provisional Urban Council, the Provisional Regional Council and Provisional District Boards should be set up on 1 July 1997 by the HKSAR Government before elections could be held to form the first district organisations of the Region. The members of these provisional bodies were appointed by the Chief Executive of the HKSAR. Their term of office will end no later than 31 December 1999.

19. The Provisional Urban Council and Provisional Regional Council each comprises 50 members. The members include all elected members of the former Urban Council and the Regional Council. In addition, nine new members were appointed to the Provisional Urban Council and 11 new members to the Provisional Regional Council. The 18 Provisional District Boards have a total of 468 members, including all elected members of the former District Boards and 95 new members. The Government is now conducting a review of the Municipal Councils and District Boards so as to decide whether the present structure of local representative

institutions can continue to ensure the efficient and responsive delivery of services to our evolving community.

The structure of the Administration

20. The Chief Executive is the head of the HKSAR Government. If the Chief Executive is not able to discharge his duties for a short period, such duties will temporarily be assumed by the Chief Secretary for Administration, Financial Secretary or Secretary for Justice in that order of precedence.

21. A Department of Administration, a Department of Finance, a Department of Justice, and various bureaux, divisions and commissions are established in the HKSAR Government. There are currently 13 policy bureaux and two resource bureaux concerned respectively with finance and the civil service. The bureaux, each headed by a Secretary, collectively form the Government Secretariat.

22. With certain exceptions, the heads of government departments are responsible to the bureaux Secretaries for the direction of their departments and the efficient implementation of approved government policy. The exceptions are the Independent Commission Against Corruption and the Commission of Audit, each of which functions independently and is accountable to the Chief Executive.

The judicial system of the HKSAR

23. The legal system is firmly based on the rule of law and a Judiciary which is independent of the legislative and executive branches of Government.

24. Article 19 of the Basic Law provides that the HKSAR shall be vested with independent judicial power, including that of final adjudication. The courts of the HKSAR shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

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

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

27. All judges and judicial officers must have qualified as legal practitioners in Hong Kong or in a common law jurisdiction and have substantial professional experience. Article 88 of the Basic Law provides that "Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors."

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

GENERAL LEGAL FRAMEWORK WITHIN WHICH HUMAN RIGHTS ARE PROTECTED

Rule of Law

29. The fundamental basis for the protection of human rights is the rule of law maintained by an independent judiciary (see paragraphs 23 to 28 above). The principles that inform the rule of law are -

- (a) **the supremacy of the law:** No individual is punishable or can lawfully be made to suffer personally or financially except for a breach of law established before the independent courts. Where, under the law, an official or an authority has a discretion to make a decision, that discretion must be exercised legally, fairly and reasonably. Where it does not do so, the decision must be capable of successful challenge before the courts. The Basic Law guarantees the right of Hong Kong residents to institute legal proceedings in the courts against the acts of the executive authorities and their personnel; and
- (b) **equality before the law:** Article 25 of the Basic Law provides that all Hong Kong residents shall be equal before the law. Article 22 provides that all offices set up in the HKSAR by departments of the Central People's Government, or by provinces, autonomous regions, or municipalities directly under the Central Government and personnel of these offices shall abide by the laws of the Region. Article 14 provides that members of the garrison shall, in addition to abiding by national laws of the PRC, abide by the laws of the HKSAR. Article 35 also provides that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. No government

authority or official, and no individual, is above the law. All persons, regardless of race, rank, politics, religion or sex, are equal before the law and subject to the same law. Individuals and the HKSAR Government have the same access to the courts to enforce legal rights or defend an action.

Some commentators have argued that the principle of equality before the law was compromised by a recent amendment to the Interpretation and General Clauses Ordinance (Chapter 1 of the Laws of the HKSAR). The amendment in question was a replacement of the reference to the “Crown” by the “State” in section 66 of the Ordinance. Before 1 July 1997, section 66 used to provide that no ordinance was binding on the Crown unless it expressly stated, or necessarily implied, that the Crown was bound. After 1 July 1997, the reference to the “Crown” in section 66 had to be amended. The amendment to section 66 of Chapter 1 was simply made in order to preserve the substance of the law before 1 July 1997 and reflect the change of sovereignty.

Human rights guarantees in the Basic Law

30. It is now possible to employ legal arguments and take legal action based on the principle of consistency with the Basic Law. Indeed, the application of the Basic Law has already been tested in several court cases.

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

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

- (k) right to social welfare in accordance with law; and
- (l) freedom of marriage and right to raise a family freely.

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

Effect of other human rights instruments in HKSAR law

32. Article 39 of the Basic Law - and the Joint Declaration - guarantee that the provisions of the ICCPR and the ICESCR as applied to Hong Kong shall remain in force. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the two Covenants.

33. In general, and as is usual in common law systems, treaties that apply to Hong Kong (including human rights treaties) do not themselves have the force of law in the domestic legal system of Hong Kong. They cannot be directly invoked before the courts as the source of individual rights. However, the courts will, when possible, construe domestic legislation in such a way as to avoid incompatibility with these international obligations. The usual method of giving effect in local law to treaty obligations (when these require some change in existing laws or practice) is to enact specific new legislation¹. Where this results in the creation or definition of specific legal rights and where these rights are denied or interfered with (or there is the threat of such action), a remedy will be available in the courts through the ordinary procedures of civil litigation; or the law may provide criminal sanctions.

¹ An example is the Crimes (Torture) Ordinance (Chapter 427 of the Laws of the HKSAR) which was enacted to give effect in Hong Kong to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Bill of Rights Ordinance

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

Adoption of laws: effect on the BORO

35. Article 160 of the Basic Law provides that the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the NPC declares to be in contravention of the Basic Law. In February 1997, the Standing Committee considered that three sections of the BORO (relating to the interpretation and application of the Ordinance²) had an overriding effect over other laws, including the Basic Law. As such, they contravened the Basic Law and could not be adopted.

36. The non-adoption of these sections has no effect on the protection of human rights in the HKSAR in view of the constitutional guarantee in Article 39 of the Basic Law. The substantive protections in Part II of the Ordinance (almost identical to the provisions of the ICCPR) are unchanged. So too are the remedies provided under section 6 for contravention of the Ordinance and the binding effect on

² The three sections were -

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

the Government and all public authorities under section 7. The full text of the BORO as it now stands is at Annex 4.

Legal aid

37. Legal aid in the HKSAR is mainly provided by the Legal Aid Department and the Duty Lawyer Service.

38. The Legal Aid Department provides eligible persons with legal representation in both civil and criminal cases. Applicants must satisfy the Director of Legal Aid of their financial eligibility (the means test) and of the justification for legal action (the merits test). In criminal cases, the Director of Legal Aid has a discretion to grant legal aid to an applicant who fails the means test if the Director is satisfied that it is in the interests of justice to do so. Moreover, in cases of murder, treason or privacy with violence, the grant of legal aid to persons for their defence or appeal is mandatory so long as they can pass the means test.

The Duty Lawyer Service

39. The Duty Lawyer Service is managed and administered by the Law Society and the Bar Association of Hong Kong. It complements the services by the Legal Aid Department and comprises -

- (a) the Duty Lawyer Scheme which offers legal representation to defendants (juvenile and adult) who are charged in the Magistracies and who cannot afford private representation. Applicants are subject to a simple means test and a merits test - based on the “interests of justice” principle - in accordance with Article 14 of the ICCPR and Article 11 of the Bill of Rights;
- (b) the Legal Advice Scheme which provides members of the public with free legal advice through individual appointments; and

- (c) the “Tel Law Scheme” which provides taped information on legal aspects of everyday problems.

Office of the Ombudsman

40. The Ombudsman - formerly known as the Commissioner for Administrative Complaints (COMAC) - is an independent authority, established under the Ombudsman Ordinance (previously known as the COMAC Ordinance). The Ombudsman investigates and reports on grievances arising from maladministration. “Maladministration” includes such things as inefficient, bad or improper administrative decisions, acts, recommendations or omissions. Members of the public can complain directly to the Ombudsman. He can also initiate investigations on his own volition and may publish investigation reports of public interest. Additionally, the Ombudsman is empowered to investigate complaints of non-compliance with the administrative Code on Access to Information³.

41. To enable him to carry out his functions effectively, the Ombudsman is able to appoint his own staff to carry out his duties. Subject to the Ombudsman Ordinance, he may obtain any information and documents from such persons as he thinks fit; he may summon any person to provide information relating to his investigations and may enter any premises of the organizations under his jurisdiction to conduct investigations. He also has sufficient means with which to ensure that his recommendations are heard and acted upon.

42. After investigation of a complaint, the Ombudsman is empowered to report his opinion and reasons, together with a statement of any remedy and recommendation that is considered necessary, to the head of the organisation affected. If the Ombudsman believes that there has been a serious irregularity or injustice done, he may make a report to the Chief Executive of the HKSAR. Such a report is bound by law to be laid before the Legislative Council.

³ The Ombudsman’s powers in respect of the Code on Access to Information extend to the Police and the ICAC, as well as to all other departments.

43. With two exceptions, the Ombudsman has jurisdiction over all Government departments of the HKSAR and major statutory bodies. The exceptions are the Police and the Independent Commission Against Corruption (ICAC). Complaints against these departments are handled by discrete, dedicated bodies. (See paragraphs 44 to 45 below).

Complaints and investigations

The Police

44. The Complaints Against Police Office (CAPO) investigates all complaints about the conduct and behaviour of members of the police force. The CAPO's investigations are monitored and reviewed by the Independent Police Complaints Council. This is an independent body comprising non-official members appointed by the Chief Executive from a wide spectrum of the community.

The ICAC

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

Other disciplined services

46. Other disciplined services departments maintain clear guidelines and procedures for handling complaints. For example, the Correctional Services Department (CSD), which runs HKSAR's prisons, has a Complaints Investigation

Unit to manage its internal grievance redress system for staff and prisoners. CSD staff and prisoners may also direct their complaints to the Ombudsman. The existing complaint channels are considered effective in view of the number and the nature of complaints handled.

47. The Immigration Department applies complaints procedures set out in the Immigration Service Standing Orders made by the Director of Immigration under the authority of the Immigration Service Ordinance. Complaints about abuse of authority or maltreatment by service members can be made to the Director of Immigration and are investigated promptly in accordance with the procedures in the Standing Orders. To ensure that all complaints are properly handled, a Complaints Review Working Party examines the results of investigations, conduct reviews and recommends follow-up action. Persons who consider that they have been improperly treated or that their cases have been mismanaged also have access to the Ombudsman. If there is evidence that a member of the Immigration Service has committed a criminal offence, the Immigration Service will immediately report the matter to the police for further investigation. Disciplinary procedures against Immigration Service staff are also governed by the Immigration Service Ordinance and the Immigration Service Standing Orders. Under section 8 of the Immigration Service Ordinance, unlawful or unnecessary exercise of authority resulting in loss or injury to any person is a disciplinary offence.

INFORMATION AND PUBLICITY

Promotion of public awareness of the human rights treaties

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

Government publications

49. The Government of the People's Republic of China (PRC) is responsible for preparing reports in respect of the HKSAR under various human rights treaties. Draft reports are prepared by the Home Affairs Bureau of the HKSAR Government. The Bureau consults the Legislative Council and non-governmental organisations on the state of the implementation of these treaties in the Region. It addresses their views in the reports which it tables before the Legislative Council - and publishes in bound, bilingual format - after the PRC Government has submitted them to the United Nations. Copies are deposited in public libraries and posted on the Internet for public inspection.

Part II

Information in relation to each of the Articles in Part I of the Convention

Article 1: defining "torture"

Section 3(1) of the Crimes (Torture) Ordinance (Chapter 427) defines the act of torture in the following terms -

“A public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”

2. The Ordinance does not restrict the concept of torture to acts committed by public officials or persons acting in an official capacity. Section 3(2) provides that -

“A person not falling within subsection (1), whatever his nationality or citizenship, commits the offence of torture if -

- (a) in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence of -
 - (i) a public official; or
 - (ii) any other person acting in an official capacity; and
- (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it."

Thus, we consider that - taken together - the provisions of section 3 are consistent with Article 1 of the Convention.

3. Under section 3(3) of the Ordinance, it is immaterial whether pain or suffering is physical or mental and whether it is caused by an act or an omission.

4. Section 3(4) provides that it shall be a defence for a person charged with the offence of torture to prove that he had lawful authority, justification or excuse for that conduct. For the purpose of the Ordinance (section 3(5)), "lawful authority, justification or excuse" means -

(a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;

(b) in relation to pain or suffering inflicted outside Hong Kong -

(i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) in any other case an authority, justification or excuse which is lawful under the law of the place where it is inflicted.

5. Some commentators have queried whether sections 3(4) and (5) of the Ordinance, which provide for a defence of "lawful authority, justification or excuse" is compatible with Article 1.1 of the Convention, which relates only to "lawful sanctions".

6. The HKSAR Government considers that the defence in sections 3(4) and (5) is consistent with the 'proviso' in the final sentence of Article 1.1. The section is an attempt to give effect to the second sentence of Article 1.1 ("Torture does not include pain or suffering arising from, inherent in or incidental to lawful sanctions"). It is intended to cover matters such as the reasonable use of force to restrain a violent prisoner. It is not intended - nor would the court be asked to interpret it as authorising - conduct intrinsically equivalent to torture.

Article 2: legislative, administrative, judicial or other measures to prevent acts of torture

7. Article 3 of the BOR provides that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his full consent to medical or scientific experimentation. This gives effect in domestic law to Article 7 of the ICCPR and, indeed, to the aims of the Convention.

8. Article 39 of the Basic Law provides, inter alia, that the provisions of the ICCPR, as applied to Hong Kong, shall remain in force and shall be implemented through the laws of the HKSAR. This means that the provisions of Article 7 of that Covenant are entrenched at the constitutional level.

9. Should an emergency arise in future which necessitates the making of new regulations under the Emergency Regulations Ordinance (Chapter 241), or should it be decided by the Standing Committee of the National People's Congress that the HKSAR was in a state of emergency beyond the control of the HKSAR under Article 18 of the Basic Law, both the new regulations and Article 18 would still be read with Article 39 of the Basic Law. In other words, derogating measures may be taken only to the extent strictly required by the exigencies of the situation and in accordance with law. No measure shall be taken that is inconsistent with any obligation under international law that applies to Hong Kong.

10. The Geneva Conventions which, inter alia, proscribe the torture or inhuman treatment of a person who is a protected person under one of the four Conventions, continue to apply to Hong Kong.

11. The Offences against the Person Ordinance (Chapter 212) makes it a criminal offence to assault a person. Depending on the circumstances, offences such as murder, wounding and assault occasioning actual bodily harm could entail acts of torture. Assaults are also civil wrongs and could found a civil action.

12. As explained in paragraph 4 above, in relation to Article 1, the defence of “lawful authority, justification or excuse” in sections 3(4) and (5) of the Crimes (Torture) Ordinance is intended to cover such matters as the reasonable use of force to restrain a violent prisoner. It does not sanction acts that are intrinsically equivalent to torture. Neither "exceptional circumstances" nor "superior orders" could be invoked in the law of Hong Kong as a justification for torture.

Instances of the alleged use of torture

13. There have been no reports of torture as defined in the Crimes (Torture) Ordinance involving the Correctional Services Department, the Customs and Excise Department and the ICAC. And, with the special exception of the case discussed in paragraph 14 below, there have been none concerning the Police. However, since the Ordinance was enacted, there have been 21 allegations involving the Immigration Department. All were investigated, none were substantiated.

Alleged use of torture by Police officers

14. In April 1998, four Police officers were found guilty of assaulting a drug addict to force a confession. They were charged and convicted for assault occasioning actual bodily harm under the Offences against the Person Ordinance (Chapter 212). The complainant alleged that the Police beat him up, poured water into his ears and nose, and stuffed a shoe into his mouth. Commentators have asked why the officers were not charged under the Crimes (Torture) Ordinance. Some have suggested that this was in order to avoid the severe penalties imposed under section 3 of the Ordinance. That view is unfounded.

15. The critical issue in determining whether it is appropriate to lay a charge of torture under section 3 of the Crimes (Torture) Ordinance is whether the prosecution can prove beyond reasonable doubt that an official has intentionally

inflicted severe pain or suffering on another in the performance or purported performance of his official duties. On an application of the ordinary rules of statutory interpretation concerning criminal statutes, section 3 requires that the prosecution must prove that the accused -

- (a) committed the act which inflicted pain intentionally; and
- (b) intended that his act would result in severe pain.

16. The word 'severe' clearly indicates the intention of the legislature to require proof beyond reasonable doubt a degree of pain above that which is normal in order to qualify as torture. Thus, it would not suffice for a court to be satisfied only that there was an intention to inflict pain. In the case under discussion, those whose duty it was to decide whether to charge and what (if any) charge to lay¹, concluded that a charge of occasioning actual bodily harm was the appropriate exercise both of the discretion to prosecute and of the related discretion to select the charge upon which to prosecute. On the basis of published guidelines, they concluded that there was no reasonable prospect of securing a conviction for an offence alleging an offence against section 3 of the Crimes (Torture) Ordinance. In reaching this conclusion, they did not overlook the fact that - within section 3 - 'severe pain' included mental pain.

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

¹ Officers of the Director of Public Prosecutions.

statement, the Police will investigate the matter. Subject to the advice of the Secretary for Justice on the evidence available, criminal and/or disciplinary action will be taken as appropriate against the officer concerned. Relevant procedures will be reviewed and changed if and as necessary.

18. The measures adopted by various disciplined forces to prevent acts of torture are set out in detail under Article 11.

Article 3: torture as a ground for refusal to expel, return or extradite

Extradition

19. As indicated in paragraph 4 above (the preface), the Fugitive Offenders Ordinance (Chapter 503) now provides the statutory framework for the implementation of bilateral agreements and multilateral arrangements on the surrender of fugitive offenders¹. Section 13 of the Ordinance gives the Chief Executive a discretion to refuse to order the surrender of a fugitive criminal to another jurisdiction. That discretion would always be exercised consistently with the obligation in Article 3 not to expel, return (refouler) or extradite persons to States where there are substantial grounds for believing that they would be in danger of being subjected to torture. The Chief Executive's decision is judicially reviewable.

20. There have been many extraditions of fugitive criminals from the HKSAR to other countries. But there has been no case of the Chief Executive having to refuse the surrender of persons on the ground that they would be in danger of being subjected to torture.

Removal and deportation

21. Article 9 of the BOR (which gives effect in domestic law to the provision of Article 13 of the ICCPR) provides that -

“A person who does not have the right of abode in Hong Kong but who is lawfully in Hong Kong may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to

¹ As at 30 September 1998, eleven bilateral agreements had been signed, eight of which had come into operation. A list of these is at Annex 5. Annex 6 is the text of the agreement with Australia which is supplied by way of illustration. The terms of these agreements are essentially uniform.

submit the reasons against his expulsion to, and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority.”

22. Section 19 of the Immigration Ordinance (Chapter 115) provides that the Director, Deputy Director or an Assistant Director of Immigration may make a removal order against a person who does not enjoy the right of abode in Hong Kong, or who does not have the Director’s permission to remain in Hong Kong. And section 20 of that Ordinance provides that the Chief Executive may make a deportation order against an immigrant if the immigrant has been found guilty of an offence punishable with imprisonment for not less than two years, or if the Chief Executive deems it to be conducive to the public good.

23. Persons subject to removal orders may appeal to the Immigration Tribunal². This is an independent statutory body established under the Immigration Ordinance. The Director of Immigration shall serve written notice on the persons to be removed informing them of the grounds on which the orders are made and their right of appeal to the Immigration Tribunal.

24. Before deportation orders are made, the persons concerned are served with a notice by the Director of Immigration informing them that they can make representations to the Director of Immigration who will include such representations in applications for deportation submitted to the Secretary for Security. They are given ample opportunity to state any grounds they may have for objecting to deportation, including the likelihood of their being subject to torture after deportation.

25. An immigrant against whom a deportation order has been made may lodge an objection to the decision with the Chief Secretary for Administration within 14 days.

² The operation of the Immigration Tribunal is explained at Annex 7.

Section 53 of the Immigration Ordinance provides that the objection will be considered by the Chief Executive in Council. Alternatively, the immigrant may make a petition to the Chief Executive under Article 48 of the Basic Law for the suspension or rescission of the deportation order.

26. Before the reunification, British citizens facing deportation had the right to make representations to a Deportation Tribunal. That privilege - which reflected the constitutional relationship between Britain and Hong Kong - was abolished in June 1997. Now, British citizens facing deportation are subject to the same arrangements as other foreign nationals.

27. Should potential removees or deportees claim that they would be subjected to torture in the country to which they are to be returned, the claim would be carefully assessed, by both the Director of Immigration and the Secretary for Security or, where the subject has appealed to the Chief Executive, by the Chief Executive in Council³. Where such a claim was considered to be well-founded, the subject's return would not be ordered. In considering such a claim, the Government would take into account all relevant considerations, including the human rights situation in the state concerned, as required by Article 3.2 of the Convention. However, there have been no cases so far where the question of torture has been an issue. Thus Article 3.2 has not been applied in any particular case.

28. Some commentators have questioned whether these arrangements apply equally to persons from all jurisdictions. The arrangements governing removal and deportation apply to all people from places outside the HKSAR, irrespective of where they come from⁴.

³ Should a removee make such a claim to the Immigration Tribunal, the Tribunal would normally give directions to refer the claim to the Secretary for Security for assessment.

⁴ There is no deportation to Mainland China.

29. Section 32 of the Immigration Ordinance provides that a person may be detained for a certain period pending his removal or deportation from Hong Kong. The period of detention is kept to a minimum as far as practicable. Commentators have asserted that such persons cannot challenge the lawfulness of their detention in view of section 11 of the BORO⁵. This is not the case: persons who are detained may apply to the Courts for a writ of habeas corpus. If that is granted, those persons will be released.

Mainland children: the Certificate of Entitlement Scheme

30. Some commentators consider that the removal to the Mainland of children who qualify as permanent residents under Article 24(3)⁶ of the Basic Law - but who fail to comply with the requirements under the Certificate of Entitlement Scheme (C of E Scheme) - constitutes cruel and inhuman treatment. For the reasons below, the Government considers that the allegation is unfounded.

31. Before 1 July 1997, persons covered by Article 24(3) of the Basic Law were not entitled to the right of abode in Hong Kong. The Basic Law is silent on the procedures by which such persons may establish their entitlement to the right of abode in the HKSAR. The Immigration (Amendment) (No. 3) Ordinance ('the No.3 Ordinance') was enacted on 10 July 1997, with effect from 1 July 1997, to provide for such procedures. This Ordinance, which introduced the C of E Scheme, provides that a person's status as a permanent resident of the HKSAR under Article 24(3) of the Basic Law can only be established by his/her holding, amongst other things, a valid travel document with a valid C of E affixed to it. In this connection, persons who were born in Mainland China to Hong Kong residents and claim that they have the right of abode in

⁵ Section 11 of the BORO provides that "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

⁶ Article 24(3) of the Basic Law is reflected in Schedule 1 of the Immigration Ordinance, which provides that a person is a permanent resident if he/she is of Chinese nationality and born outside Hong Kong to a parent who is a permanent resident and who had the right of abode in Hong Kong at the time of the birth of the person.

the HKSAR have to obtain a valid travel document and C of E before being admitted to Hong Kong. This arrangement ensures that those who claim that they have the right of abode in the HKSAR under Article 24(3) of the Basic Law have that claim verified before entering Hong Kong.

32. To expedite entry for family reunion, a sub-quota of 48 places has been reserved (under the overall daily quota of 150) to enable Mainland mothers to take with them a child aged under 14 when they enter Hong Kong for settlement. Nevertheless, some families continue to arrange for their children to enter Hong Kong illegally. When discovered, they are removed to the Mainland. Removal remains necessary both in justice to those waiting their turn in the queue and to preserve an orderly and manageable rate of entry. The C of E Scheme does not deprive individuals of their rights. Hong Kong permanent residents have the right to leave Hong Kong. If families do live apart, it is because they have chosen to do so and not because of the Ordinance. Hong Kong permanent residents have the right to leave Hong Kong and to join their families in Mainland China.

Repatriation of Vietnamese migrants

33. The issue of Vietnamese asylum seekers is coming to a close following the decision in January 1998 to end the port of first asylum policy.

34. As at 30 September 1998, there were about 1,060 Vietnamese refugees remaining in Hong Kong awaiting resettlement overseas. There were also about 640 Vietnamese persons who had been determined to be non-refugees under the Comprehensive Plan of Action⁷ (CPA). They comprise -

⁷ The Comprehensive Plan of Action was agreed by all 74 main resettlement and first asylum countries and the country of origin at the International Conference on IndoChinese refugees (ICICR) hosted by the UNHCR in Geneva in June 1989. This provided for the implementation of a fair and just refugee determination process. The CPA was the cornerstone of the Hong Kong Government's policy on Vietnamese migrants. The CPA

- (a) **the 390 ‘non-nationals’**: most of these people are ethnic Chinese. The Vietnamese Government has been refusing to recognise them as its nationals or to agree to their repatriation. But some 70 of them have family members who have been identified as Vietnamese nationals (see (b) below). They and their families have been released on recognisance and live at the Pillar Point Centre. The Vietnamese Government has indicated that it will re-consider these particular cases individually if there is fresh information proving that persons concerned are indeed Vietnamese nationals. Progress has been slow. But we will continue to seek the return of all the “non-nationals”; and
- (b) **the 250 whose repatriations have been delayed**: this group has been ‘cleared’ for return by the Vietnamese Government. But some 110 of them are family members of the 70 “non-nationals” discussed in (a) above. Others - for various reasons - have yet to be repatriated. Some of these are in ill health; some are serving prison sentences; some are involved in court proceedings; others are missing. All will be repatriated when the factors delaying their repatriation are resolved or, in the case of the escapees, when they are recaptured.

formally came to an end on 30 June 1996 as agreed at the seventh meeting of the Steering Committee of the ICICR held in March 1996.

The Government will continue to pursue their return to Vietnam in accordance with practices established during the time of the CPA. Most of them have been released on recognisance and live in an open centre⁸. The last Vietnamese detention centre in Hong Kong was closed in May 1998.

Vietnamese illegal immigrants

35. As at 30 September 1998, there were about 370 Vietnamese illegal immigrants in the territory. To speed up their repatriation, Vietnamese Government officials regularly travel to Hong Kong to interview them and to verify their identity. Otherwise, they have the rights - and are subject to the procedures - described in paragraphs 21 to 29 above (in relation to removal and deportations).

36. The repatriation of Vietnamese illegal immigrants is likely to be an on-going programme for as long as the incentive of black market job opportunities remains.

Ex-China Vietnamese

37. This term refers to some 300 persons now in Hong Kong who fled Vietnam in the early 1980s. They settled in Mainland China and lived there for some years before moving to Hong Kong. Most of them arrived in 1993 without legal documentation. They have initiated judicial review proceedings against the Government's decision to remove them to Mainland China. At the time of drafting this report, the matter was still before the Courts. Pending the Court's ruling, the persons concerned have been released on recognisance in accordance with the ruling by the Court of First Instance in habeas corpus proceedings that they initiated in mid-1997. Both the Court of Appeal and the Court of Final Appeal subsequently ruled that the detention of most of these people was lawful. But

⁸ The minority who have not been released are those in jail and the escapees.

the Government has undertaken not to re-detain them until the Court of First Instance has delivered its decision in the judicial review proceedings.

Article 4: making acts of torture offences under the criminal law

38. As explained in paragraphs 1 to 2 above (in relation to Article 1), torture is prohibited under section 3 of the Crimes (Torture) Ordinance. Persons who commit acts of torture (as defined in the Ordinance) are liable to imprisonment for life. We have also explained that offences defined under other statutes could entail the crime of torture.

39. Section 89 of the Criminal Procedures Ordinance (Chapter 221) provides that “a person who aids, abets, counsels, or procures the commission by another person of any offence is guilty of the like offence.”

Article 5: establishment of jurisdiction

40. Section 3 of the Crimes (Torture) Ordinance provides that the offence of torture is committed whether the conduct takes place in the HKSAR or elsewhere. The nationality of the perpetrator or the victim is immaterial. The courts of the HKSAR have full jurisdiction in conformity with this Article.

Article 6: powers of detention

41. The power to arrest and detain a person alleged to have participated in an act of torture is provided under the Police Force Ordinance (Chapter 232). Section 50(1) of that Ordinance empowers the Police to arrest, without warrant, persons reasonably suspected of such offences¹. Arrested persons detained for questioning shall normally be charged and taken before a magistrates' court as soon as practicable and in any event within 48 hours. Otherwise, they must either be charged, released and bailed to appear in court or be released without charge, either on bail or without bail.

42. These provisions apply to all persons within the territory of the HKSAR, regardless of their nationality or country of origin.

43. The Fugitive Offenders Ordinance and the Fugitive Offender (Torture) Order (Chapter 503I) permit the HKSAR to surrender persons to parties to the Torture Convention for offences of torture. Section 7 of that Ordinance empowers a magistrate to issue a warrant for the arrest of a person suspected of such acts and further requires that a person so arrested be brought as soon as practicable before a magistrate sitting as the court of committal. The court of committal is empowered under the Ordinance to remand a person in custody or on bail pending the submission of the formal request for surrender by a Convention Party and the receipt of Authority to Proceed issued by the Chief Executive pertaining to the request.

44. In accordance with Article 6.3, persons arrested or detained with a view to trial or extradition for the offence of torture enjoy the protections in Article 5 of the BOR (Annex 4) which gives effect in domestic law to the provisions of Article 9 of the ICCPR. Law enforcement officers of the HKSAR are required to comply with the

¹ The provision requires that the officer reasonably believes that the person apprehended is guilty of (inter alia) an offence for which a person may, on first conviction, be sentenced for imprisonment. Torture would certainly be such an offence.

Vienna Convention on Consular Relation 1963. If a person in custody is a foreign national and so requests, our law enforcement agencies inform the consulate of the relevant State that the person has been arrested or committed to prison - or to custody pending trial - or is detained in any other manner. Consular officers have freedom of access to - and communications with - that person. Where the States of which the arrestees/detainees are nationals have no consular presence in the HKSAR, they will be asked if they wish their arrest to be notified to their consular authorities elsewhere. If that is their wish, the law enforcement agencies would render necessary assistance without delay.

Article 7: prosecution of offenders who are not to be extradited

45. The law regarding the investigation, prosecution and trial of alleged criminal offences, and the rights of persons charged with or convicted such offences¹, accord with the provisions of Article 7. So too do the established practices of the relevant authorities. These matters are regulated by Articles 5, 6, and 10 to 12 of the BOR (Annex 4) which correspond respectively to Articles 9, 10, 14 and 15 of the ICCPR. The provisions of that Covenant - as applied to Hong Kong - are entrenched at the constitutional level by Article 39 of the Basic Law.

¹ The law relating to these matters is extensive and it would not be practical to provide an exhaustive list of the provisions entailed. However, examples include the Criminal Procedures Ordinance, the Police Force Ordinance and the Magistrates Ordinance (Chapter 227).

Article 8: extradition arrangements

46. As explained in paragraph 19 above in relation to Article 3, the Government has negotiated a network of bilateral agreements on the surrender of fugitive offenders. These are listed at Annex 5.

47. And - as explained in paragraph 43 above in relation to Article 6, the Fugitive Offenders (Torture) Order applies the procedures in the Fugitive Offenders Ordinance to requests for extradition by jurisdictions to which the Convention applies for offences created by the Convention. This enables the Government to extradite such offenders to all such jurisdictions. Extradition may be granted even if the jurisdiction requesting it is exercising extra-territorial jurisdiction in respect of the offence¹.

48. At the time of drafting this report, there had been no such requests.

¹ Thus, for example, if a state were to seek the extradition of a person, the HKSAR Government would do so, provided that the state in question had jurisdiction over that person by virtue of its laws or of any treaties it had entered into. Extradition would proceed even if the person's offence had been committed outside the requesting state.

Article 9: mutual assistance in relation to crimes of torture

49. Assistance to States Parties may be effected on an informal, non-statutory basis by the provision of information and investigatory assistance. Where formal provision of evidence is requested, the necessary machinery is provided by sections 75 to 77B of the Evidence Ordinance (Chapter 8). These provide that the Court of First Instance may compel witnesses to testify if a request is received from a foreign court in which criminal proceedings have been instituted or are likely to be instituted if such evidence is obtained.

50. The Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525) - enacted in 1997 - empowers the HKSAR Government to provide certain forms of assistance provided an agreement is in place or reciprocity is guaranteed. These are -

- (a) the taking of evidence or the production of a thing in court;
- (b) the search or seizure of a thing or the production of documents pursuant to court orders;
- (c) the service of documents;
- (d) the transfer of prisoners to give assistance; and
- (e) the seizure and confiscation of the proceeds of crime.

As at 30 September 1998, agreements had been signed with Australia, France, New Zealand, the UK and the US. Subsidiary legislation was being prepared to bring them into force. The terms are essentially standard. By way of illustration, the text of the agreement with Australia is at Annex 8.

Liaison between HKSAR and Mainland authorities

51. The Hong Kong Police and the Mainland Ministry of Public Security maintain close contact through the Liaison Bureau and Interpol National Centre Bureau

China in relation to cross-boundary crimes committed in Hong Kong and the Mainland. This complements the daily contacts between Hong Kong police, immigration and customs officers and their counterparts in Guangdong Province¹ through the boundary liaison channel that has been in place since 1981.

¹ All the HKSAR's boundaries adjoin Guangdong Province.

Article 10: education and information on the prohibition of torture

Police

52. The Police force fully recognizes the importance of ensuring that their officers treat all persons - including detainees and arrested persons - as individuals, with humanity and respect, and to act within the law at all times. To that end, the basic and subsequent training of Police officers includes, inter-alia, procedures for handling suspects and the disciplinary codes prescribed in the Police Force Ordinance, the Police General Order and Headquarters Order, and the BORO. Reference is made to the Crimes (Torture) Ordinance - in appropriate contexts - throughout the training process. The Police have also issued a booklet to help front-line officers understand the Rules and Directions for the Questioning of Suspects and the Taking of Statements (see paragraph 72 below in relation to Article 11).

Correctional Services Department

53. Induction and on-going training (such as in-service and development training) ensure that staff are familiar with the requirements of the relevant laws and policies. The training process covers the United Nations Standard Minimum Rules for the Treatment of Prisoners, the BORO and the provisions of the Crimes (Torture) Ordinance. And training in general nursing care enables staff to identify physical signs of abuse. Selected members of staff receive specialist training - in areas such as psychiatric nursing - that provides them with the professional knowledge necessary to assist medical officers in the monitoring of the physical and mental well-being of inmates with psychiatric problems.

Customs and Excise Department

54. All officers involved in the custody, interrogation or treatment of arrested persons or detainees - whether disciplined or civilian - are trained in the proper handling

of such persons. The training process emphasises the need to treat everyone as an individual, with humanity and respect, and to act within the law at all times. It covers, inter alia, the BORO, the Crimes (Torture) Ordinance, detailed procedures such as the Rules and Directions for the Questioning of Suspects and the Taking of Statements and other internal orders and instructions aimed at ensuring the proper treatment of detainees or arrested persons.

Immigration Department

55. All immigration officers receive instruction on the proper handling of arrested persons in the course of their induction and in-service training. Like the other disciplined services, the training process covers the provisions of the BORO and the Crimes (Torture) Ordinance. And they, too, are trained to treat all persons with humanity and respect and to act within the law at all times.

Independent Commission Against Corruption

56. All ICAC officers are made aware that torture is an offence. To ensure that detainees are treated fairly while in ICAC custody, all officers receive comprehensive training on the Rules and Directions for the Questioning of Suspects and the Taking of Statements, the BORO and the ICAC (Treatment of Detained Persons) Order (Chapter 204A)¹.

Training of health care professionals on recognition of signs of abuse

57. All health care professionals, and in particular doctors and nurses working under the Hospital Authority and the Department of Health, are equipped through their training to recognise clinical features and physical signs that are suggestive of abuse.

¹ The Treatment of Detained Persons Order contains rules covering the detention, notification of relatives, communication with legal advisers, supply of food and drink, provisions of toilet facilities, exercise, treatment of sickness and injury and visits by Justices of the Peace.

They would include the sequela of torture. Both nurses and doctors closely monitor the physical and mental well-being of patients in the course of routine patient care.

58. Similarly, psychiatrists and psychiatric nurses working under the Hospital Authority are equipped with the skills and knowledge necessary to identify psychological indications of mental anguish, itself a possible indication of torture or cruel, inhuman, or degrading treatment or punishment. They are also trained to exercise care and patience in dealing with patients with mental disorders and to provide suitable medical intervention.

Article 11: review of interrogation rules, instructions, methods and practices for custody and treatment of persons arrested or detained

Law Enforcement Agencies

59. In 1997, following public consultations the Government initiated a three-year programme of improvements in relation to the powers of law enforcement agencies to stop, search, arrest and detain a person¹. This entails -

- (a) publishing leaflets on the powers and procedures relating to stop, search, arrest and detention;
- (b) formalising existing practice by appointing “Custody Officers” to ensure the proper treatment of persons in detention and “Review Officers” to assess the need for further detention;
- (c) extending the use of videotaping interviews of suspects;
- (d) amending legislation to -
 - (i) clarify the provisions governing the length of detention;
 - (ii) provide continuous and accountable review of the need for longer periods of detention; and
 - (iii) provide a statutory right for an arrested person to inform a friend or relative or consult a lawyer privately at any time (again, formalising an existing practice); and
- (e) improving the standard of detention facilities.

¹ The programme was on the basis of recommendations put forward by a working group formed to examine proposals advanced by the Law Reform Commission with a view to improving existing safeguards against possible abuses of power.

Police

60. No form of physical violence is tolerated or condoned in the treatment of detained and arrested persons. The Offences Against the Person Ordinance also prohibits acts of physical violence committed by any person including Police Officers.

Correctional Services Department

61. The operation of custodial institutions and detention centres under the Correctional Services Department are governed by the -

- (a) Prisons Ordinance and its subsidiary legislation (Chapter 234);
- (b) Detention Centres Ordinance and its subsidiary legislation (Chapter 239);
- (c) Drug Addiction Treatment Centres Ordinance and its subsidiary legislation (Chapter 244);
- (d) Training Centres Ordinance and its subsidiary legislation (Chapter 280);
and
- (e) Immigration Ordinance and its subsidiary legislation (Chapter 115).

62. These provide for the treatment of inmates in the Department's custody and regulate the conduct and discipline of both staff and inmates. They are complemented by administrative instructions and guidelines on the everyday management of the institutions. All take full account of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

63. The Department's programmes emphasise correction and rehabilitation. Torture and other cruel, inhuman or degrading treatment or punishment are strictly prohibited. They are regularly reviewed to ensure their consistency with the Basic Law

(which entrenches the ICCPR) and the BOR. Staff who fail to comply are liable to disciplinary or criminal proceedings.

Measures to detect signs of physical abuse/torture

64. Trained nursing staff conduct regular body checks on all inmates at least once a week to detect signs of injury and skin infection. Any sign of injury will be thoroughly investigated to confirm its cause. The Department is alert to possible abuse - including abuse that could amount to torture - by other inmates and regularly works with other Government authorities to detect and prevent criminal activities in the institutions that might involve such acts. Visiting Justices of the Peace are required by law to visit prisons on a regular basis and report abuses to the Commissioner of Correctional Services. The Commissioner, in turn, is required to consider their views and suggestions and to take such action as may be appropriate.

Corporal punishment

65. Corporal punishment was abolished in 1990. All references to it have been removed from the statutes.

Suicides in custody

66. In 1997, four prisoners committed suicide - all by hanging - while in custody². The Coroner made certain recommendations to prevent similar fatalities in future. These recommendations have always received the highest attention of the Department. Some of them have been implemented while the others are being pursued. As at 30 September 1998, there had been a further three deaths, also by hanging. The inquests were still in progress at the time of drafting this report.

² Confirmed by verdict of the Coroner's Court.

Immigration Department

67. The powers to arrest and detain a suspect are provided under the Immigration Ordinance and Immigration Service Ordinance. The treatment of persons so detained is prescribed in the Immigration Service (Treatment of Detained Persons) Order³. To ensure that the detained persons are treated in accordance with the law, section 18 of the Order provides for the visits of the Justices of the Peace (JPs) to the Detention Centre. Complaints so received are investigated and any views or suggestions made by the visiting JPs are considered by the Director of Immigration. The rights and interests of suspects and detained persons are also safeguarded through standing orders and administrative guidelines on the procedures for the questioning and handling of suspect. A bilingual notice detailing the rights of persons in custody is displayed in all places of detention and interview rooms.

68. Tape (and video)-recording of interviews is progressively being introduced as the necessary equipment is installed. A further initiative⁴ to prevent possible abuse of power was the appointment of “Custody Officers” - responsible for ensuring that detainees are treated properly and impartially - and “Review Officers”, who regularly review the need for further detention.

Customs and Excise Department

69. The Customs and Excise Department video-records its interviews of suspects subject to their agreement and to the availability of facilities. Additional facilities for this purpose are under construction and will be ready for use by the end of 1998.

³ Immigration Service Ordinance sub. leg. (Chapter 331C).

⁴ Introduced in May 1998.

Independent Commission Against Corruption

70. Officers of the Commission have power to arrest suspects and to detain them for a limited period for the purpose of further inquiries. Persons so detained are held in a purpose-built Detention Centre. The Detention Centre facilities were recently refurbished to ensure the health and comfort of detainees. Detention Centre staff are officers of the Commission but are not involved in its investigative work. Their duties are restricted to the custody and welfare of detainees and they are answerable to their Guard Commander. The number of officers employed on these duties is kept under regular review.

71. The treatment, rights and dignities of persons detained by the Commission are protected and controlled under the Independent Commission Against Corruption (Treatment of Detained Persons) Order.⁵

Secretary for Security's 'Rules and Directions for the Questioning of Suspects and the Taking of Statements'

72. These have replaced the former Judges' Rules and apply to law enforcement officers in the Hong Kong Police Force, the Customs and Excise Department, the Immigration Department and the Independent Commission Against Corruption. They set out the rules and directions for law enforcement officers to question suspects and take statements and cover such areas as cautioning of suspects, the right to contact friends, the right to private consultation with a legal adviser, the right to obtain copies of any statement made, and the right to be provided with reasonable arrangement for refreshment. The Rules are intended to ensure that interviews are conducted fairly and that any resulting confession is not procured by threat or inducement. Failure on the part of law enforcement officers to comply with the Rules may render inadmissible any evidence obtained as a result of such failure.

⁵ Chapter 204, subsidiary legislation.

Patients detained under mental health legislation

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

74. The criteria for the compulsory admission of persons to mental hospital are -

- (a) they must be suffering from a mental disorder as defined by the Ordinance;
- (b) the mental disorder must be of a nature or degree which makes admission to mental hospital appropriate;
- (c) medical treatment must be necessary for the patients' own health or safety or for the protection of other persons; and
- (d) the treatment cannot be provided in some other way, such as on an out-patient basis.

75. The stringency of these criteria reflects the gravity of a situation where a person's freedom is restricted. Whether they are satisfied in any individual case is a matter of professional judgement on the part of the doctors and others concerned.

76. Under the Mental Health Ordinance, a medical assessment is mandatory before a patient is detained in a mental hospital for observation. Prior to such committal, patients have the right to be heard by a judge or magistrate, if they so wish. Committal forms must be countersigned by a judge or magistrate.

77. Section 45 of the Mental Health Ordinance provides for the compulsory detention. That is, if - on the basis of medical testimony - the court is satisfied that a convicted offender is suffering from mental disorder, it may order that person's admission to, and detention in, a mental hospital for psychiatric treatment if that is the most suitable method of disposing of the case. Section 52 empowers the Chief Executive to order the transfer of mentally disordered prisoners from the institutions where they are detained to such mental hospital as is specified in the order for treatment. Section 53 provides this power in respect of prisoners who are not serving prison sentences⁶.

78. The Ordinance provides important safeguards of the rights for detained patients. Patients and their relatives may apply to the Mental Health Review Tribunal, an independent statutory body, for review of their detention and treatment. If the review finds that the detention and treatment should continue, they may apply again after 12 months or earlier with the leave of the Tribunal. The Ordinance also provides that - if neither the patients nor their relatives apply for review - their cases will periodically be referred to the Tribunal. Such referrals will be made by the Medical Superintendent - if the patient is liable to be detained in a mental hospital - or by the Commissioner for Correctional Services if the patient is liable to be detained in the Correctional Services Department Psychiatric Centre. The Tribunal has the power to direct that a patient be discharged. Persons applying to the Tribunal may apply for legal aid. Patients may be represented before the Tribunal by anyone they wish, except by other mental patients.

79. Additionally -

- (a) all detained patients must be given an explanation of their rights under the Mental Health Ordinance. The matters covered must include the procedures for securing their discharge, the conduct of their treatment,

⁶ For example, prisoners who have been remanded in custody awaiting trial or sentence.

how they can make a complaint and their rights in relation to Mental Health Review Tribunals;

- (b) a relative of every detained patient should be kept fully advised of the patient's rights, unless the patient objects;
- (c) like all other persons, detained patients are entitled, at their own expense, to seek legal advice or a second medical opinion;
- (d) the Mental Health Regulations prevent arbitrary interference in the privacy and freedom of patients in mental hospitals. They prescribe clear conditions under which a medical superintendent may impose restrictions on the communication (such as letters and parcels) between patients and persons outside. Superintendents must inform the patients and the persons with whom they are in communication of a decision to impose such restrictions.

80. Formerly, when accused persons were found not guilty of an offence by reason of insanity, or unfit to be tried, courts had no option but to order their detention in the Correctional Services Department Psychiatric Centre or in a mental hospital. Now, recent amendments to the Criminal Procedure Ordinance and the Mental Health Ordinance provide the additional options such as guardianship orders, supervision and treatment orders, and orders for absolute discharge.

Electro-convulsive therapy (ECT)

81. Like medical institutions elsewhere, public hospitals in Hong Kong use ECT for patients with severe depressive illness, mania or schizophrenia. ECT is considered a safe and effective treatment for patients with strong suicidal tendencies and for those who do not respond well to drug therapy. There are clear guidelines governing the application of ECT to patients. The major indication for use of ECT is in cases of

severe depressive illness. To a lesser extent it is also indicated for patients with mania or schizophrenia, especially as an adjunct to neuroleptic treatment when response to medication has not been satisfactory.

82. Electro-convulsive treatment is carried out in public hospitals by qualified and properly trained health care professionals including psychiatrists, anaesthetists and nurses. This technique is applied in accordance with guidelines endorsed by the Quality Assurance Sub-Committee of the Co-ordinating Committee (Psychiatry) of the Hospital Authority. These guidelines are compatible with international standards.

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

84. In recent years, the pattern of application has been -

	1995-96	1996-97	1997-98
Number of patients receiving ECT	226	191	180
Number of treatments	1,279	1,081	1,080
Average number of treatments per patient	5.65	5.66	6

Article 12: prompt and impartial investigation of acts of torture

85. As explained in paragraph 41 above in relation to Article 6, the power to arrest and detain a person alleged to have participated in an act of torture rests with the Police. Nevertheless, all the disciplined forces maintain complaint systems. These are described below.

Police

86. Complaints against Police officers are dealt with by the Complaints Against Police Office (CAPO) under the Commissioner of Police. But they are monitored and reviewed by a civilian body, the Independent Police Complaints Council (IPCC). The IPCC comprises non-official members appointed by the Chief Executive from a wide spectrum of the community. Any person aggrieved by the conduct of a Police officer in the execution of his duties may make a complaint to CAPO. The results of CAPO's investigations are rigorously scrutinised by the IPCC. In discharging their duties, IPCC members may observe CAPO investigations, either by prior arrangement or on a surprise basis. They may also interview complainants, complainees, witnesses and professionals - such as forensic pathologists - from whom they may receive expert advice.

87. Following an independent review of the complaints procedures and a comparative study of overseas Police complaints systems, the Government has introduced over 40 measures to enhance the transparency and credibility of the system in Hong Kong. These include -

- (a) setting target norms for the handling of complaints (such as the time limits within which CAPO must complete an investigation in normal circumstances);

- (b) establishing a special panel under the IPCC to monitor investigations of serious complaints;
- (c) tightening Police procedures: for example, requiring a duty officer at a police station to ask suspects - in the absence of investigating officers - whether they have any complaints against the Police and to report any such complaints to CAPO;
- (d) giving complainants more details of investigation results and making available additional information on CAPO procedures at all police stations;
- (e) opening part of the IPCC's meetings to the public; and
- (f) launching a \$3 million publicity campaign to enhance public awareness of the complaints system.

88. Statistics relating to cases handled by the CAPO and endorsed¹ by the IPCC are at Annex 9. These show that the number of complaints alleging assault has decreased over the past three years. Only seven of the 1,324 allegations of assault (1997) were substantiated. None were found to amount to acts of torture.

89. In July 1996, the Government introduced a Bill into the then Legislative Council with the aim of making the IPCC a statutory body. The Bill was withdrawn in June 1997 after Legislators moved major amendments which - if implemented - would have disrupted the effective operation of the Police complaints system, fundamentally changing the main principles of the Bill.

¹ In this context, 'endorsed' means that, having examined the findings of CAPO investigations, the IPCC agrees with them. If it does not, the Council can ask CAPO to clarify areas of doubt or to reinvestigate the complaint.

90. At the time of drafting this report, the Government was reviewing the provisions of the Bill and considering the way forward.

Correctional Services Department

91. The Complaints Investigation Unit (CIU) of the Correctional Services Department is vested with independent power to investigate any complaints made against the Department and its staff.

92. On average, the CIU needs about eight weeks to complete an investigation. All complaints are dealt with fairly, openly and in accordance with both the letter and the spirit of the Prison Rules, the Department's Standing Orders, and its 'Complaints Handling Manual'. As indicated above, these take full account of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

93. The CIU's findings are scrutinised by the Department's 'Case Review Committee'. The Committee's decisions may be scrutinised by external bodies such as the Ombudsman and the Justices of the Peace. Complainants and complainees are informed in writing of the outcome of the investigations into their complaints. Complainants who are dissatisfied with those findings may seek re-examination by the Case Review Committee - with or without further supporting materials or fresh evidence - within 14 days of such notification.

Immigration Department

94. Normally, the Immigration Department refers all allegations of criminal offences, including torture, to the Police. But complaints concerning the attitude, behavior, or working efficiency of its staff are handled by the Department's Complaint Unit which is independent from all operation sections. The Unit normally completes an investigation within two months. Its findings are reported to a working party, headed by an Assistant Director of Immigration, for review and endorsement. Other details of

complaint procedures of the Department are described in paragraph 47 of the General Profile and in paragraphs 118 and 119 below in relation to Article 13.

Customs and Excise Department

95. Administrative guidelines require all complaints - whether verbal or written - to be investigated and dealt with expeditiously and impartially. Ab initio, they must be brought to the attention of the Deputy Commissioner of Customs and Excise. Complaints that indicate the possible commission of a criminal offence are promptly referred to the Police. The investigation of other complaints is monitored by the Deputy Commissioner. Complaints must be handled within six weeks. No extension of this limit may be made without the prior approval of the Deputy Commissioner.

Independent Commission Against Corruption

96. The Independent Commission Against Corruption Complaints Committee (the Committee) is an independent body appointed by the Chief Executive. It monitors and reviews the ICAC's handling of complaints against the Commission and its officers. The Committee may also make recommendations to improve the ICAC procedures. It is chaired by the convenor of the Executive Council and consists of leading members of the community, including Members of the Executive and the Legislative Councils. The Ombudsman is an ex-officio member.

97. Complaints against the ICAC are investigated internally by a special unit. On completing its investigations, the Unit submits its findings for the consideration of the Committee.

98. In 1997, there were 30 complaints against the ICAC and its officers. In 1996 there were 22. Of the 30 received in 1997, 19 contained more than one allegation. Indeed, there were a total of 76 allegations. Most (47% of these) alleged misconduct on

the part of ICAC officers. Another 33% related to neglect of duties. The remaining 20% related to abuse of power and to ICAC procedures.

99. Nine of the 32 complaints² considered by the Committee in 1997 contained allegations that were found to be either substantiated or partially substantiated. Examples included a delay in providing a receipt on a seized property and failure to explain to a detainee the reason for his extended detention.

100. Complaints on assault and other unlawful violation of a person's physical integrity or liberty by ICAC officers are complaints of a criminal nature. These are referred to the Police for investigation.

101. Some commentators suggested that the Government should include non-ICAC members in the investigations of complaints against the ICAC officers. We do not think that this is necessary. Complaints about crimes other than corruption are referred to the Police for investigation. The ICAC investigates complaints concerning corruption only after obtaining the consent of the Secretary for Justice. Investigations are reviewed by an Operations Review Committee that comprises 12 non-official members. Together, these suffice to ensure the impartiality of investigations.

² Some of these were 'overspills' from 1996.

Article 13: right of complaint

Police

102. The position is as explained in paragraphs 86 to 90 above in relation to Article 12. All persons in Police custody have the right to complain if they are aggrieved by the conduct of Police officers in the execution of their duties. As explained in paragraph 44 of the General Profile - and in paragraph 86 above in relation to Article 12 - such complaints are handled by CAPO whose subsequent investigations are monitored and reviewed by the IPCC.

103. Detailed procedures for the handling of complaints are prescribed in the 'Police General Orders'.

Correctional Services Department

104. All prisoners are informed of the avenues of complaint available to them through induction sessions, booklets, notices posted in institutions, and at interviews with officers of the Correctional Services Department (CSD).

105. The investigation of complaints falls to the Department's Complaints Investigation Unit. The Unit's findings are scrutinised by an (impartial) Case Review Committee. All complainants - and those complained of, if any - are informed in writing of the outcome of the investigations of their complaints. Complainants aggrieved by these findings may seek re-examination by the Case Review Committee - with or without further supporting materials or fresh evidence - within 14 days of such notification.

106. In 1997, inmates made a total of 204 complaints to the Complaints Investigation Unit. These concerned use of unnecessary force, general misconduct (such as use of abusive language), and abuse of authority by CSD staff. Fourteen of these were substantiated.

107. The handling of a particular complaint depends on the Unit's assessment of its nature and seriousness. That is -

- (a) **'major complaints'** are those determined to be of a serious or abnormal nature, such as the alleged use of unnecessary force. Action is taken by the Unit itself;
- (b) **'minor complaints'** concern trivial matters arising from minor misconduct, administrative oversight, and so forth. Depending on the circumstances, the Unit may direct the institution concerned to investigate a complaint of this nature; and
- (c) **'operational complaints'** relate to routine or operational matters and can generally be resolved 'on the spot' by the prison management.

108. Avenues of complaint are prescribed in the Prison Rules (Chapter 234A). Rule 95 provides that heads of institution shall ensure that every prisoner shall have ample facilities to make complaints or requests to them, and that all grievances received are redressed so far as is possible. Rule 228 states that the visiting Justices of the Peace have the duty to hear and investigate any complaints that prisoners may desire to make to them.

Complaints to the Ombudsman

109. Analysis of complaints that prisoners have made to the Ombudsman indicates that most concern -

- treatment by prison staff;
- welfare issues, including prison conditions or facilities, food and diet, mail handling, extra visits, access to telephone, access to medical service and standard of care;

- discipline, segregation, protection and control;
- prison transfer and labour allocation; and
- handling of complaints and access to visiting JPs and the Ombudsman.

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

- on admission to penal institutions, prisoners receive leaflets informing them of the Ombudsman's services and how to access them;
- on request, prisoners are given post-free complaint forms issued by the Ombudsman's Office;
- all penal institutions display dedicated notice boards and posters informing prisoners of matters relating to the Ombudsman;
- procedures are in place to facilitate investigatory visits by the Ombudsman's Office; and
- correspondence between prisoners and the Ombudsman is promptly delivered¹.

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

- the penal system placed increasing emphasis on correction and rehabilitation;

¹ Under the Prison (Amendment) Rules 1997, prison staff may not read letters that prisoners write to the Ombudsman.

- the Correctional Services Department's "Vision, Mission Statement and Values" had due regard to the interests and rights of inmates in its legal custody; and
- the Department's internal complaint system was properly established and generally accessible. Its Complaints Investigation Unit provided an independent internal channel for complaints. The Unit's work was subject to the scrutiny of the Case Review Committee.

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

- enhanced publicity of the internal complaint system;
- target response time for complaint handling; and
- improving staff training in complaints handling skills.

The Government has carefully considered these suggestions and is actively pursuing those that are practicable.

Incident at Ma Po Ping Prison: Lautau Island

113. On 27 July 1998, staff at Ma Po Ping Prison took action to prevent a disturbance between two groups of prisoners. Over 60 prisoners were involved and the staff tried to keep the two groups apart. Some of the prisoners tried to seize batons from the staff and individual officers were physically attacked. It then became necessary for the officers involved to use a degree of force to bring the situation under control. Two officers and 19 prisoners sustained injuries: most being minor abrasions, bruises and redness on the body or limbs.

114. More than 70 prisoners then filed complaints with the Correctional Services Department, the Police, the Ombudsman, Legislative Councillors, and Justices of the Peace. On 30 July, the Commissioner of Correctional Services ordered a full investigation by a Board of Inquiry. The Board was chaired by an Assistant Commissioner. Its members comprised senior officers from institutions other than Ma Po Ping. In the course of its inquiries, the Board took more than 300 statements from the complainants, prison staff and some 160 other prisoners who might have witnessed the incident. It also reviewed a video tape of the incident and relevant documents such as the medical reports on the persons who sustained injury.

115. The Board's main findings were that -

- the force used by the prison staff was necessary and its use was justified given the nature and extent of the disturbance. And the action had successfully restored order; and
- there was room for improvement in the prison management's handling of the incident and in its general preparations for such outbreaks. The conduct of certain individual staff was called into question.

116. The management of Ma Po Ping Prison was admonished. The members of staff whose conduct was called into question may face disciplinary action. But proceedings against them have been deferred pending the outcome of a separate and independent Police investigation of the prisoners' complaints to the Police. That investigation was in progress at the time of drafting this report.

117. Some commentators have expressed concern that the enquiry was conducted on a purely internal basis. Their concern is understandable. But the enquiry was conducted with scrupulous impartiality by senior officers who, at the time, were not directly responsible for the daily operation of the institution involved. The Board

considered all the relevant evidence - including the statements made by the complainants and other witnesses, the medical reports relating to the complaints about the use of force - before reaching its conclusions. Its findings drew attention to deficiencies in the handling of incident as well as to the actions that were entirely appropriate. The Department took immediate steps to strengthen the management of the institution, to improve staff training in the handling of such incidents, and to review its existing operational guidelines (the latter were found to be adequate for their purpose).

Immigration Department

118. Persons wishing to lodge complaints may -

- (a) speak directly to the officer-in-charge; or
- (b) write to the Immigration Headquarters, or ask their legal representatives, friends or relatives to do so; or
- (c) complain to Legislative Councillors, the Ombudsman, the Chief Executive, visiting Justice of the Peace, or to the courts.

119. Departmental standing orders govern the handling of complaints from different sources. These include rules on the need to keep proper records; to designate a specific officer to take charge of investigations; the time-frame within which investigations must be conducted; action on the findings; and review procedures. A review working party, headed by an Assistant Director, reviews all complaints received and handled.

Customs and Excise Department

120. Persons in Customs custody who consider that they have been ill-treated may complain to any Customs officer. Detailed procedures for the handling of complaints are prescribed in a Departmental Standing Circular. All complaints made by detainees must be properly recorded and reported to the Deputy Commissioner of Customs and Excise as soon

as possible. The Deputy Commissioner will determine the course of action to be taken. Cases will be referred to the Police or to the ICAC if there is suspicion of a criminal offence that falls within their respective purviews.

121. Ten complaints of assault were received in 1997. All were found unsubstantiated after thorough investigation.

Independent Commission Against Corruption

122. All persons detained by the Commission are, upon release, specifically asked if they wish to complain about any aspect of their detention. They are invited to provide details in writing. The written complaints are then immediately referred to a Senior Officer for action.

123. Complaints of ill-treatment may also be made to the Commissioner direct, to the Police, to Legislative Councillors, or to the Independent Commission Against Corruption Complaints Committee (see paragraph 96 above in relation to Article 12).

124. The table below provides the number of complaints of assault made against ICAC officers between 1995-1998 -

	1995	1996	1997	1998 (up to September)
No. of complaints	0	1	4	0
Investigation result:				
- Not substantiated	0	1	3	0
- Still under Police investigation	0	0	1	0

Avenues for complaint by mental patients

125. Such avenues include the Medical Superintendent of the hospital concerned or the visiting Justices of the Peace who, under the Mental Health Ordinance are required to pay monthly visits to the hospitals.

126. Section 65 of the Mental Health Ordinance provides that the ill-treatment and/or wilful neglect of a mental patient is a criminal offence. Mental patients who claim to have sustained harm as a result of such conduct have recourse to the courts for civil redress.

127. The Hospital Authority has well-established complaint handling procedures. All complaints are thoroughly investigated under the supervision of senior management and complainants are informed of the outcome - verbally and/or in writing - once investigations are complete.

128. Complainants who are dissatisfied with the outcome of such investigations may seek a review by the Public Complaints Committee (PCC) of the Hospital Authority or by the Ombudsman. The PCC is an independent committee, formed under the Hospital Authority Board to consider and determine complaints. Its membership comprises members of the general community and ‘non-executives’² of the Hospital Authority Board. Of all the complaint cases lodged by mental patients (including two appeal cases handled by the PCC), none of the cases relating to allegations of malpractice in the management and care provided to patients were found to be substantiated.

² ‘Non-executive’ members are persons who are not the staff of the Hospital Authority and are not involved in its daily operation.

The total number of complaints received from mental patients by the Hospital Authority		
1995-96	1996-97	1997-98
128	140	164

Article 14: legal redress for victims of torture and an enforceable right to fair and adequate compensation

129. Under the Crown Proceedings Ordinance (Chapter 300) a person who alleges that a civil wrong (which would of course include an act of torture) has been committed against him by a public official acting in the course of his employment may bring an action for damages not only against the official in question but also against the Hong Kong Government. The nationality or other status (for example, as a refugee) of the plaintiff is immaterial.

130. Where a person is convicted of an offence, the Criminal Procedures Ordinance empowers the court to order that person to pay to any aggrieved person compensation - at a level that it considers reasonable - for personal injury and/or the loss of or damage to property. Section 12 of the Costs in Criminal Cases Ordinance (Chapter 492) empowers the court to award costs against persons convicted of indictable offences.

Criminal and Law Enforcement Injuries Compensation Scheme

131. This Scheme provides for the payment of compensation for any injury (whether physical or psychiatric) or death resulting from -

- (a) any criminal offence involving the use of violence by the assailant on the victim; or
- (b) the use of a weapon by a law enforcement officer in the course of his duty. A “law enforcement officer” means any police officer or other public officer on duty.

132. The Scheme is publicly funded and is not means tested. It extends to all persons - residents, foreign visitors, or refugees - who have entered Hong Kong legally.

133. The Scheme is administered by two Boards: the Criminal Injuries Compensation Board, and the Law Enforcement Injuries Compensation Board. Each considers claims in respect of the category of injury for which it is responsible. Applicants are notified of the Boards' decisions in writing. Appeals against those decisions can be made to an ad hoc 'appended board' that is convened upon application. Legal representation in the appeal may be allowed (at the appellant's own expense), subject to the approval of the appeal board.

134. Compensation is paid in the form of a lump sum grant. The rates paid in relation to criminal injuries are based on those paid under the Emergency Relief Fund. They currently range from HK\$1,692 to HK\$139,825. The rates paid in relation to injuries arising from law enforcement are assessed either on the basis of common law damages or in accordance with the Emergency Relief Fund rates, whichever is the greater.

Article 15: statements made as a result of torture shall not be invoked as evidence

135. Under common law no statements by persons accused of crimes are admissible against them unless they are shown by the prosecution to have been voluntary statements. That is, the statements have not been obtained either by fear of prejudice or hope of advantage excited or held out by a person in authority or obtained by oppression. Thus, it is clear that on no account would a statement obtained by torture be admissible.

136. Law enforcement agencies are required to adhere to the “Rules and Directions for the Questioning of Suspects and the Taking of Statements” (see paragraph 72 above in relation to Article 11).

137. The Police, Customs and Immigration services - the departments most frequently involved in the process of taking statements - are progressively expanding the use of video-interviewing. By the end of 1998, every major divisional Police station will have its own video-interviewing facility. At present, the Immigration Department has one video interview room and the Customs and Excise Department has three. They will install additional facilities as needed and subject to the availability of resources. The use of video-interviewing has long been a standard practice of the ICAC.

Review of the ‘voir dire’ procedure

138. Before evidence of a confession statement can be admitted in a criminal trial, the prosecution must prove that the confession was voluntarily obtained. Where the trial is before a judge and jury, the determination of this issue will generally take place in the absence of the jury in what is called a “*voir dire*” (or “trial within a trial”). In the *voir dire*, evidence is led as to the obtaining of the statement. At the conclusion of the *voir dire*, the judge rules as to whether or not the statement is admissible. If the statement is ruled inadmissible, the jury, on their return to court, will not be told anything about the confession. If, on the other hand, the statement is ruled admissible, the evidence as to the

confession will be led once more, but this time in the presence of the jury. The result is that, where the statement is ruled admissible after a *voir dire*, there is a duplication of evidence and concern has been expressed that this is an unnecessary waste of court time and resources.

139. In response, the independent Law Reform Commission has been examining the issue to establish whether there are ways of streamlining the process without in any way or degree compromising the safeguards provided by the existing system. The *voir dire* is by no means a universal process and options for consideration might include, for example, the Scottish approach which allows *all* the evidence (including that relating to admissibility) to go before the jury, and relying on the jury to determine whether or not admissions have been made voluntarily. The Commission expects to publish its findings for consultation in December 1998. Its consultation paper will invite comment on several options. At this stage, the Commission has reached no conclusion as to a preferred option and will seek the public's views before making any final recommendations.

Article 16: prevention of other acts of cruel, inhuman or degrading treatment or punishment

General

140. To a large extent, the legislative and administrative provisions discussed in the earlier parts of this report in relation to torture apply equally to conduct that falls short of torture but may amount to cruel, inhuman or degrading treatment or punishment. It is the position of the HKSAR Government that all persons acting in a public capacity shall act according to the rule of law. To that end, it has put in place measures to ensure that any cruel, inhuman or degrading treatment or punishment committed by, at the instigation of, or with the consent or acquiescence of, any public official - or by anyone acting in an official capacity - would be subject to criminal or disciplinary sanctions.

141. At the risk of some repetition, the following paragraphs draw to certain features of the system (and more generally, of the situation currently obtaining in Hong Kong) that the Committee may consider to be relevant in this context.

Police disciplinary procedures

142. It is an offence against discipline for a Police officer to exercise unlawful or unnecessary authority resulting in loss or injury to any other person¹. The Regulations prescribe procedures for investigation of offences, punishment and appeals. Persons aggrieved by the conduct of Police officers in the execution of their duties have access to the complaints system discussed in paragraphs 86 to 90 above in relation to Article 12 and paragraphs 102 to 103 in relation to Article 13.

Ill-treatment of children

143. The Government is committed to protecting victims of child abuse

¹ Police (Discipline) Regulations, Police Force Ordinance (Chapter 232) sub-legislation.

and to bringing offenders to justice. Laws that exist for the achievement of that aim include the -

- (a) Offences against the Persons Ordinance (Chapter 212): this contains provisions on wounding or inflicting grievous bodily harm, assault occasioning actual bodily harm;
- (b) Crimes Ordinance (Chapter 200): Part VI and XII contain provisions to protect children from sexual abuse; and
- (c) Criminal Procedure Ordinance (Chapter 221): Part IIIA makes special provisions for the treatment of child witnesses and other vulnerable groups (see paragraph 145 below).

144. The taking of evidence and the construction of victims' accounts of child abuse require particular sensitivity and skill and the Police have established dedicated units to handle such cases. These are the Police Child Protection Policy Unit and the Child Abuse Investigation Units. These units take an interdisciplinary approach to their work, with the Police, social workers and clinical psychologists working closely together to discover the facts of the cases while seeking to minimise the trauma of both victims and their families. A child victim's first account of alleged abuse is video-taped by an officer specifically trained for the purpose. And the trauma of giving evidence in Court is avoided by allowing video-taped testimony² to stand as such evidence and permitting the victims to testify or be cross-examined by live television link. On-going training programmes are organised for Police officers to keep them abreast of procedures and developments and to 'sensitise' them to the special needs of child victims.

145. The Child Protection Special Investigation Team - jointly operated by the Police and the Social Welfare Department - investigates cases of suspected child abuse and makes video recordings of interviews with the victims. Where the

² This is specifically provided for in Part IIIA of the Criminal Procedure Ordinance.

witness is a child or is mentally handicapped, a ‘support person’ may also be present with the permission of the court.³ Further, Direction 5 of the Rules and Directions for the Questioning of Suspects and the Taking of Statements provides that children and young persons under the age of 16 years should only be interviewed in the presence of a parent or guardian, or, in their absence, a person who is not a police officer and is of the same sex as the child.

146. Care and protection orders are issued by the Magistrates Courts. Some commentators consider this unsuitable because, they say, the children in question are often placed in the same rooms as juvenile offenders, are frightened, confused, and perceive themselves as being guilty of wrongdoing. The commentators who take this view consider the Court procedure to be a form of degrading, even cruel, treatment. The Government considers that this view is exaggerated. Certainly, there is no intention to cause the children any distress.

147. The arrangements are in accordance with section 34 of the Protection of Children and Juveniles Ordinance (Chapter 213) which was originally drafted on the model of the corresponding UK legislation. We are considering whether the system can be improved. Should we find that changes are desirable we will proceed accordingly. One proposal being considered is to have different Juvenile Courts, one specialising in Care and Protection cases, the other in criminal matters. Meanwhile, we recognise that most of our magistracies were designed for the conduct of criminal proceedings and that some children might find them somewhat forbidding. Court officials do what they can to reduce any stress that children involved in care and protection cases might experience. For example -

- where conditions (such as the caseload in a particular court) permit, they will schedule the hearing of criminal cases on different days - or at different sessions - from care and protection cases;
- in the event that children involved in criminal proceedings and

³ See paragraph 7 of the Chief Justice’s ‘Practice Direction’ of February 1996 at Annex 10.

children in need of care or protection orders are attending the same court, they will not be placed in the same waiting room. Police officers will look after them and ensure that there is no contact between the two groups;

- children involved in care or protection cases are accompanied by their family members and/or caseworkers to provide emotional and psychological support; and
- where physical constraints permit, children in particular need of emotional support may be invited to await their hearings in the office of the duty probation officer. This arrangement is admittedly not ideal. But it affords a measure of privacy and a sense of security.

Children in institutional care

148. As a matter of policy, the use of physical and mental punishment to discipline children in residential homes is not permitted. Instead, discipline is maintained through a system of “positive reinforcement” (rewarding good behaviour and deterring misbehaviour by adjusting points/grades gained). The Social Welfare Department closely monitors the operation of such homes. The homes themselves work closely with parents and caseworkers to ensure the welfare and development of the children in their care.

149. The Social Welfare Department’s ‘Visiting Officers’ visit homes run by NGOs on a regular basis. And the Justices of the Peace regularly visit the homes without prior notice so as to ensure that there is no concealment of malpractice. The Visiting Officers, the Justices of the Peace and the Department’s District Social Welfare Officers are all empowered to receive complaints direct and to investigate them. Action will be taken to rectify matters if the complaints are substantiated. The children or their families also have access to external channels such as the Ombudsman, members of the Legislative Council or the Police. So far, none have

reported complaints of maltreatment or excessive punishment on the part of the homes.

Young offenders in custody

150. The custody and treatment of young persons detained in homes operated by the Social Welfare Department homes are governed by -

<u>Persons</u>	<u>By</u>
Placed under probation order with residential requirement in probation homes/hostels.	Probation of Offenders Ordinance and Probation of Offenders Rules, Chapter 298.
Placed under reformatory school order.	Reformatory Schools Ordinance and the Reformatory School Rules, Chapter 225.
Placed under detention in accordance with section 15(1)(k) of the Juvenile Offenders Ordinance.	Juvenile Offenders Ordinance and Remand Home Rules, Chapter 226.
Placed under remand, pending investigation by Police, trial or sentence.	Juvenile Offenders Ordinance and the Remand Home Rules, Chapter 226.

151. The rules and regulations made under these Ordinances prescribe the minimum requirements for treatment, punishment and visits by the Justices of the Peace. Additionally, the ‘Manual of Procedures, Correctional Institutions and Aftercare Service’ provides for the daily operation of all residential services.

152. Social workers in residential services receive induction, refresher and on-the-job training to ensure that they are familiar with the relevant legal requirements and the standards of treatment that they are expected to provide. Inmates (referred to as ‘clients’) or their relatives may air any grievances they may have with the field management, the Director of Social Welfare or external authorities such as Ombudsman, Members of the Legislative Council, or the Police. Such grievances could, of course, relate to acts of cruel, inhuman or degrading

treatment of punishment.

153. The management and operation of residential units is the responsibility of their Superintendents. They, in turn, are supervised by, and accountable to, Senior Social Work Officers. And they are supervised by and accountable to a Chief Social Work Officer. Two Justices of the Peace visit each residential unit monthly and without notice. Their observation reports are forwarded to the policy bureau. They are empowered by law to interview any resident, and to look into any issue concerning the residential unit.

154. Each residential unit has a full-time registered nurse, and is visited weekly (once or twice depending on need) by a qualified registered medical practitioner. These officers are by profession trained to recognise physical signs of abuse. Residents are allowed visits on a daily basis. This affords regular and frequent contact with family and friends, helping to ensure that any ill-treatment will readily be exposed. The unit receive regular visits by social work students supervised by training institute instructors, and large numbers of volunteers from universities and post-secondary colleges. Residents' letters to their parents and friends are uncensored. Together, these measures help to guard against abuse.

155. Prominent notices in each office/residential unit inform clients and their families of their right to lodge complaints with the supervisor of the officer-in-charge of the unit or with the Ombudsman. The names and telephone numbers of those officers are printed on the notice.

156. All complaints of ill-treatment are thoroughly investigated in accordance with operational instructions, departmental complaints procedures and legal requirements. The complainant will be advised of the outcome. Where a complaint concerns conduct which is or which may be criminal offence, the matter is reported to the Police for investigation. In other cases, or where the police advise that criminal proceedings are not appropriate, action will be taken, if necessary, according to the disciplinary procedures governing the civil service.

The Ombudsman

157. In 1997-98, the Ombudsman investigated a total of 355 complaints. None entailed torture and other cruel, inhuman or degrading treatment or punishment.

Avenues for complaints against ICAC staff

158. These are discussed in paragraphs 96 to 101 above in relation to Article 12 and in paragraphs 122 to 124 in relation to Article 13.

**THE BASIC LAW OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE REPUBLIC OF CHINA**

Please refer to the following address :

http://www.info.gov.hk/basic_law/english/fo2.htm

**FUGITIVE OFFENDERS (TORTURE) ORDER
(Chapter 503 sub. leg. I)**

Please refer to the following address :

<http://www.justice.gov.hk/home.htm>

**FUGITIVE OFFENDERS ORDINANCE
(Chapter 503)**

Please refer to the following address :

<http://www.justice.gov.hk/home.htm>

**HONG KONG BILL OF RIGHTS ORDINANCE
(Chapter 383)**

Please refer to the following address :

<http://www.justice.gov.hk/home.htm>

List of signed agreements on surrender of fugitive offenders

1. Agreement between the Government of the Kingdom of the Netherlands and the Government of Hong Kong for the Surrender of Fugitive Offenders*
2. Agreement between the Government of Hong Kong and the Government of Canada for the Surrender of Fugitive Offenders*
3. Agreement for the Surrender of Accused and Convicted Persons between the Government of Hong Kong and the Government of Australia*
4. Agreement between the Government of Hong Kong and the Government of the Republic of the Philippines for the Surrender of Accused and Convicted Person*
5. Agreement between the Government of Hong Kong and the Government of the United States of America for the Surrender of Fugitive Offenders*
6. Agreement for the Surrender of Fugitive offenders between the Government of Hong Kong and the Government of the Republic of India*
7. Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland for the Surrender of Fugitive Offenders*
8. Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Singapore for the Surrender of Fugitive Offenders*
9. Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders

10. Agreement between the Government of Hong Kong and the Government of the Republic of Indonesia for the Surrender of Fugitive Offenders
11. Agreement for the Surrender of Accused and Convicted persons between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of New Zealand

* Agreements in operation as at 30 September 1998.

AGREEMENT

FOR THE SURRENDER OF

ACCUSED AND CONVICTED PERSONS

BETWEEN

THE GOVERNMENT OF HONG KONG

AND

THE GOVERNMENT OF AUSTRALIA

The Government of Hong Kong, having been duly authorised to conclude this Agreement by the sovereign government which is responsible for its foreign affairs, and the Government of Australia

Desiring to make provision for the surrender of persons accused or convicted of a criminal offence;

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the requested Party and who is wanted by the requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence described in Article 2.

ARTICLE 2

OFFENCES

(1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty:

- (i) offences relating to the unlawful taking of human life;
- (ii) genocide;
- (iii) offences relating to unlawful wounding or injuring; assault including assault occasioning bodily harm and threats to kill; intentional or reckless endangering of life;
- (iv) aiding, abetting, counselling or procuring suicide;
- (v) offences relating to the unlawful termination of pregnancy;
- (vi) kidnapping; abduction; false imprisonment; unlawful confinement; dealing in slaves or other persons; taking a hostage;
- (vii) stealing, abandoning, exposing or unlawfully detaining a child; any other offences involving the exploitation of children;
- (viii) offences of a sexual nature including rape, sexual assault, indecent assault and unlawful sexual acts upon children; statutory sexual offences;

- (ix) offences against laws relating to prostitution and premises kept for the purposes of prostitution;
- (x) offences against laws relating to drugs, including narcotics and psychotropic substances;
- (xi) theft, robbery, burglary (including breaking and entering); blackmail and extortion; handling or receiving stolen property; any offence against the law relating to unlawful deprivation of property;
- (xii) criminal damage to property; arson;
- (xiii) offences involving the unlawful use of computers;
- (xiv) offences against the laws relating to fraudulent activities; obtaining property, money, valuable securities or pecuniary advantage by false pretences or deception; embezzlement; conspiracy to defraud; false accounting;
- (xv) offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, or customs regulation of the same kind as the law of the requesting Party;
- (xvi) offences against the law relating to counterfeiting; forgery; uttering a forged or false document;
- (xvii) offences against the laws relating to bankruptcy or insolvency;

- (xviii) offences against the laws relating to companies and securities;
- (xix) offences against the laws relating to corruption, including bribery, secret commissions, and breach of trust;
- (xx) offences against the laws relating to the administration of justice; perjury; subornation of perjury; attempting to pervert the course of justice;
- (xxi) offences relating to unlawful escape from custody; mutiny in prison;
- (xxii) offences against the laws relating to firearms, ammunition or explosives;
- (xxiii) unlawful use, possession, control, seizure or hijacking of aircraft, vessels or other means of transportation;
- (xxiv) piracy;
- (xxv) offences against the laws relating to the protection of public health and the environment;
- (xxvi) smuggling; offences against laws relating to the import and export of prohibited items, including historical and archaeological items;
- (xxvii) facilitating for gain the illegal immigration of persons;
- (xxviii) offences for which surrender may be granted under international conventions binding on the Parties; offences created as a result of decisions of international organisations which are binding on the Parties;

- (xxix) offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement;
- (xxx) aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting or conspiring to commit any offence for which surrender may be granted under this Agreement;
- (xxxi) any other offences for which surrender may be granted in accordance with the laws of both Parties.

(2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.

(3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference to the elements of the offence prescribed by the law of the requesting Party.

(4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the requesting Party at the time it was committed and an offence against the law of the requested Party at the time the request for surrender is received.

ARTICLE 3

SURRENDER OF NATIONALS

(1) The Government of Australia reserves the right to refuse the surrender of its nationals. The Government of Hong Kong reserves the right to refuse the surrender of nationals of the state whose Government is responsible for its foreign affairs.

(2) Where the requested Party exercises this right, the requesting Party may request that the case be submitted to the competent authorities of the requested Party in order that proceedings for prosecution of the person may be considered.

ARTICLE 4

DEATH PENALTY

If the offence for which surrender is requested under this Agreement is punishable according to the law of the requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, surrender may be refused unless the requesting Party gives such assurances as the requested Party considers sufficient that this penalty will not be imposed or if imposed will not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the requested Party or to prove that the person

sought is the person convicted by the courts of the requesting Party.

ARTICLE 6

REFUSAL OF SURRENDER

(1) A person shall not be surrendered if the requested Party has substantial grounds for believing:

(a) that the offence of which that person is accused or was convicted is an offence of a political character;

(b) that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality or political opinions; or

(c) that the person might, if returned, be prejudiced at trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions.

(2) For the purposes of paragraph (1), an offence of a political character does not include any offence in respect of which both Parties have an obligation in accordance with a multilateral agreement either to surrender the person sought or to submit the case to their competent authorities for decision as to prosecution.

(3) Surrender for an offence shall be refused if the person whose surrender is sought cannot under the law of either Party be prosecuted or punished for that offence.

ARTICLE 7

DISCRETIONARY REFUSAL OF SURRENDER

Surrender may be refused if the requested Party considers that:

- (a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender;
- (b) there has been excessive delay, for reasons which cannot be imputed to the person sought, in bringing charges, in bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;
- (c) the offence for which surrender is sought was committed within the jurisdiction of its courts;
- (d) the surrender might place that Party in breach of its obligations under international treaties; or
- (e) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.

ARTICLE 8

POSTPONEMENT OF SURRENDER

If the person sought is being proceeded against or is under punishment in the jurisdiction of the requested Party for any other offence, surrender shall be deferred until the conclusion of the proceedings and the execution of any punishment awarded.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

(1) Requests for surrender and related documents shall be conveyed through the appropriate authority as may be notified from time to time by one Party to the other.

(2) The request shall be accompanied by:

(a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;

(b) a statement of each offence for which surrender is sought and a statement of the acts and omissions which are alleged against the person in respect of each offence; and

(c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.

(3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify committal for trial if the offence had been committed within the jurisdiction of the requested Party.

(4) If the request relates to a person already convicted or sentenced, it shall also be accompanied by:

(a) a copy of the certificate of the conviction or sentence; and

(b) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of

the warrant of arrest; or

- (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has still to be served.

ARTICLE 10

AUTHENTICATION

(1) Any document that, in accordance with Article 9, accompanies a request for surrender shall be admitted in evidence, if authenticated, in any proceedings in the jurisdiction of the requested Party.

(2) A document is authenticated for the purposes of this Agreement if:

- (a) it purports to be signed or certified by a Judge, Magistrate or other officer authorised by the requesting Party; and
- (b) it purports to be sealed with an official or public seal of the requesting Party or of an officer of the requesting Party.

ARTICLE 11

LANGUAGE OF DOCUMENTATION

All documents submitted in accordance with this Agreement shall be in, or translated into, an official language of the requested Party, to be specified by the requested Party in each case.

ARTICLE 12

PROVISIONAL ARREST

(1) In urgent cases the person sought may, in accordance with the law of the requested party, be provisionally arrested on the application of the requesting Party. The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought and the text of a warrant of arrest or a judgment of conviction against that person, a statement of the penalty for that offence, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offence been committed, or the person sought convicted, within the jurisdiction of the requested Party.

(2) An application for provisional arrest may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (Interpol).

(3) The provisional arrest of the person sought shall be terminated upon the expiration of forty-five days from the date of arrest if the request for surrender has not been received, unless the requesting Party can justify continued provisional arrest of the person sought in which case the period of provisional arrest shall be terminated upon the expiration of a reasonable time not being more than a further fifteen days. This provision shall not prevent the re-arrest or surrender of the person sought if the request for that person's surrender is received subsequently.

ARTICLE 13

ADDITIONAL INFORMATION

(1) If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Agreement, the latter Party

shall request the necessary supplementary information and may fix a time-limit for receipt thereof.

(2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the requesting Party from making a fresh request for the surrender of the person.

ARTICLE 14

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and a state with whom Australia or Hong Kong, whichever is being requested, has agreements or arrangements for the surrender of accused and convicted persons, the requested Party shall make its decision having regard to all the circumstances including the provisions in this regard in any agreements in force between the requested party and the requesting Parties, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the possibility of subsequent surrender to another state, and furnish the other Party with information justifying its decision in the event of surrender of the person to another jurisdiction.

ARTICLE 15

REPRESENTATION AND COSTS

(1) The requested Party shall make all necessary arrangements for and meet the costs of any proceedings arising out of a request for surrender and shall otherwise represent the interests of

the requesting Party.

(2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to deciding how these expenses will be met.

(3) The requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered. The requesting Party shall bear all subsequent expenses.

ARTICLE 16

ARRANGEMENTS FOR SURRENDER

(1) The requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the requesting Party.

(2) When a person is to be surrendered, that person shall be sent by the authorities of the requested Party to such convenient place of departure within that Party's jurisdiction as the requesting Party shall indicate.

(3) Subject to the provisions of paragraph (4) of this Article, the requesting Party shall remove the person within the period specified by the requested Party and if the person is not removed within that period the requested Party may refuse to surrender that person for the same offence.

(4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree a new date for surrender and the provisions of paragraph (3) of this Article shall apply.

ARTICLE 17

SURRENDER OF PROPOERTY

(1) When a request for surrender is granted the requested Party shall, so far as its law allows hand over, upon request, to the requesting Party all articles, including sums of money:

- (a) which may serve as proof of the offence; or
- (b) which have been acquired by the person sought as a result of the offence and are in that person's possession or discovered subsequently.

(2) The requested Party may temporarily retain any property mentioned in paragraph (1) if it is the subject of, or is required for, proceedings in that jurisdiction, or it may temporarily surrender it on condition that it be returned free of charge.

(3) These provisions shall not prejudice the rights of the requested Party or of any person other than the person sought. When such rights exist the articles shall on request be returned to the requested Party without charge as soon as possible after the end of the proceedings.

(4) The property mentioned in paragraph (1) shall, if the requesting Party so requests, be surrendered even though the person cannot be surrendered owing to death, disappearance or escape.

ARTICLE 18

RULE OF SPECIALTY

(1) A person who has been surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of any sentence for any offence committed prior to surrender other than:

- (a) the offence in respect of which return is ordered;

- (b) any lesser offence, however described, disclosed by the facts in respect of which return was ordered provided such an offence is an offence for which the person sought can be returned under this Agreement;
- (c) any other offence being an offence for which surrender may be granted under this Agreement in respect of which the requested Party consents to the person being dealt with;

unless that person has first had an opportunity to leave Australia or Hong Kong, as the case may be, and has not done so within forty days of having been free to leave or has returned after having left.

(2) A Party whose consent is requested under paragraph (1)(c) may require the submission of any document or statement mentioned in Article 9.

ARTICLE 19

RESURRENDER

(1) Where a person has been surrendered to the requesting Party by the requested Party, that person is not liable to surrender or rendition to any other state or jurisdiction for an offence committed before that person's surrender unless:

- (a) the requested Party consents to that surrender or rendition; or
- (b) the person has first had an opportunity to leave Australia or Hong Kong, as the case may be, and has not done so within forty days of having been free to leave or has returned after having left.

(2) A Party whose consent is requested under paragraph (1)(a) may require the submission of any document or statement mentioned in Article 9.

ARTICLE 20

TRANSIT

(1) To the extent permitted by its law, transit through the jurisdiction of a Party may be granted on a request in writing. The Party through whose jurisdiction transit will occur may request the information referred to in paragraph (2)(b) of Article 9.

(2) Permission, if given, for the transit of a person shall include permission for the person to be held in custody during transit.

ARTICLE 21

ENTRY INTO FORCE AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of commission of the offence or offences set out in the request.

(3) Each of the Parties may terminate this agreement at any time by giving notice in writing to the other through the same channels as a request for surrender. In that event the Agreement shall cease to have effect six months after the receipt of notice.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done at Hong Kong, this fifteenth day of November one thousand nine hundred and ninety three, in the Chinese and English languages, each text being equally authentic.

For the Government of
Hong Kong:

For the Government of
Australia:

Immigration Tribunal

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

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

AGREEMENT BETWEEN
THE GOVERNMENT OF HONG KONG
AND
THE GOVERNMENT OF AUSTRALIA
CONCERNING MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS

The Government of Hong Kong, having been duly authorised by the sovereign government responsible for the foreign affairs relating to Hong Kong, and the Government of Australia,

Desiring to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation of criminal proceeds,

Have agreed as follows:

Article I
Scope of assistance

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation and prosecution of criminal offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence, articles or documents, including the execution of letters rogatory;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses;
- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating property used in or derived from criminal activities and the proceeds of criminal activities;
- (i) providing information, documents and records;
- (j) delivery of property, including lending of exhibits; and
- (k) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

(3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.

- (4) Assistance shall not include:
- (a) the surrender of any fugitive offender;
 - (b) the execution in the Requested Party of criminal judgments imposed in the Requesting Party except to the extent permitted by the law of the Requested Party and this Agreement; and
 - (c) the transfer of persons in custody to serve sentences.

Article II
Central Authority

- (1) Each Party shall establish a Central Authority.
- (2) The Central Authority of Hong Kong shall be the Attorney General or his duly authorised officer. The Central Authority for Australia shall be the Attorney-General's Department, Canberra.
- (3) Requests under this Agreement shall be made only by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

Article III
Other assistance

The Parties may provide assistance pursuant to other agreements, arrangements or practices.

Article IV
Limitations on compliance

- (1) The Requested Party shall refuse assistance if:
 - (a) the request for assistance impairs the sovereignty, security or public order of Australia or, in the case of Hong Kong, of the State which is responsible for the foreign affairs relating to Hong Kong;
 - (b) the request for assistance relates to an offence of a political character;
 - (c) the request for assistance relates to an offence only under military law;
 - (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of that person's race, sex, religion, nationality or political opinions;
 - (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requesting or Requested Party or has served the sentence imposed in either Party;
 - (f) it is of the opinion that the granting of the request would seriously impair its essential interests; or

- (g) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence.
- (2) The Requested Party may refuse assistance if:
- (a) the request for assistance relates to the prosecution or punishment of a person who could no longer be prosecuted by reason of lapse of time or for any other reason if the offence had been committed within the jurisdiction of the Requested Party;
 - (b) the Requesting Party cannot comply with any conditions relating to confidentiality or limitation as to the use of material provided; or
 - (c) the request for assistance relates to the prosecution or punishment of a person for an offence which is committed outside the area under the jurisdiction of the Requesting Party and the law of the Requested Party does not provide for the punishment of an offence committed in similar circumstances.
- (3) For the purpose of paragraph (1)(f) the Requested Party may include in its consideration of essential interests whether the provision of assistance could prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.
- (4) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, not carried out.
- (5) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.
- (6) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority :
- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
 - (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.
- (7) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (6)(b), it shall comply with those terms and conditions.

Article V
Requests

- (1) Requests shall be made in writing except in urgent cases. In urgent cases, requests may be made orally, but shall be confirmed in writing within 10 days thereafter.
- (2) Requests for assistance shall include:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request and the nature of the assistance requested;
 - (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
 - (d) where proceedings have been instituted, details of the proceedings;
 - (e) the court order, if any, or a certified copy thereof, sought to be enforced and a statement to the effect that it is a final order;
 - (f) a summary of the relevant facts and laws;
 - (g) any requirements for confidentiality;
 - (h) details of any particular procedure the Requesting Party wishes to be followed; and
 - (i) details of the period within which the request should be complied with.
- (3) Requests, and all documents submitted in support of requests, shall be accompanied by a translation in the language of the Requested Party.

Article VI
Execution of requests

- (1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.
- (2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.
- (3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.
- (4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.
- (5) Where required by the Requested Party, the Requesting Party shall return the material provided under this Agreement when no longer needed for the relevant investigation or proceeding.

Article VII
Representation and expenses

- (1) The Requested party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
- (2) The Requested Party shall assume all ordinary expenses of executing a request except:
 - (a) fees of counsel retained at the request of the Requesting Party;
 - (b) fees of experts;
 - (c) expenses of translation;
 - (d) the expenses associated with conveying any person to or from the Requested Party, and any fees, allowances or expenses payable to that person whilst in the Requesting Party pursuant to a request under this Agreement; and
 - (e) the expenses associated with conveying custodial or escorting officers.
- (3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

Article VIII
Confidentiality and limitations of use

- (1) The Requested Party shall use its best efforts to keep confidential a request, its contents and the fact that it has been granted, except when otherwise authorized by the Requesting Party. If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.
- (2) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.
- (3) The Requesting Party shall not disclose or use information or evidence furnished for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.

Article IX
Obtaining of evidence, articles or documents

- (1) Where a request is made that evidence be taken for the purpose of an investigation, a prosecution of a criminal offence or a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party the Requested Party shall, subject to its laws, arrange to take such evidence.
- (2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (3) For the purposes of requests under this Article the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.
- (4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.
- (5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence where either:
 - (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
 - (b) where the law of the Requesting Party would permit the person to decline to give evidence in such proceedings in the Requesting Party.
- (6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

Article X
Obtaining statements of persons

Where a request is made to obtain the statement of a person for the purpose of an investigation or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

Article XI
Location or identity of persons

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

Article XII
Service of documents

- (1) The Requested Party shall serve any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (4) The Requested Party may effect service of any document by mail or, if the Requesting Party so requests, in any other manner required by the law of the Requesting Party which is not inconsistent with the law of the Requested Party.
- (5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.
- (6) Persons who fail to comply with any process served on them shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party.

Article XIII
Publicly available and official documents

- (1) Subject to its law the Requested Party shall provide copies of publicly available documents, records or information.
- (2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

Article XIV
Certification and authentication

- (1) Documents or materials supporting a request for assistance involving the use of compulsory measures or the forfeiture or confiscation of the proceeds of crime shall be admissible in proceedings in the Requested Party if they -
 - (a) purport to be signed or certified by a Judge, Magistrate or other officer in or of the Requesting Party; and
 - (b) purport to be sealed with an official or public seal of the Requesting Party or an officer of the Requesting Party.

(2) Documents or materials furnished in response to a request shall only be signed or certified and sealed if requested. Other documents or materials shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

Article XV
Transfer of persons in custody

(1) A person in custody in the Requested Party whose presence is requested in the Requesting Party for the purposes of providing assistance pursuant to this Agreement shall if the Requested Party consents be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and their subsequent return to the Requested Party.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody and that the person is treated as a person referred to in Article XVI.

Article XVI
Transfer of other persons

(1) The Requesting Party may request the assistance of the Requested Party in making a person available for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to consent to travel to and remain in the Requesting Party to provide assistance.

Article XVII
Safe conduct

(1) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be prosecuted, detained, or restricted in their personal liberty in the Requesting Party for any criminal offence or proceeded against on a civil matter which preceded their departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article XV, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that their presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles XV or XVI shall not be subject to prosecution based on that person's testimony, except for perjury and contempt.

(4) A person who consents to provide assistance pursuant to Articles XV or XVI shall not be required to give evidence or to assist any investigation other than the proceeding or investigation to which the request relates.

(5) A person who does not consent to give assistance pursuant to Articles XV or XVI shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting or Requested Party.

Article XVIII Search and seizure

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter provided that the information supplied would justify such action under the law of the Requested Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the material seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized material which is delivered to the Requesting Party.

Article XIX Proceeds of crime

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a Court of the Requesting Party.

(3) Upon request, the Requested Party shall, to the extent its laws permit, give effect to a final order forfeiting or confiscating proceeds of crime made by a court of the Requesting Party.

(4) In the application of this Article, the rights of bona fide third parties shall be respected under the law of the Requested Party.

(5) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise decided by the Parties in a particular case.

(6) In this Article "proceeds of crime" includes:

- (a) property used in connection with the commission of an offence;
- (b) property derived or realized, directly or indirectly, from the commission of an offence; or
- (c) property which represents the value of property and other benefits derived from the commission of an offence.

Article XX
Settlement of disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities are themselves unable to reach agreement.

Article XXI
Entry into force and termination

- (1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of the Agreement have been complied with.
- (2) This Agreement shall apply to requests whether or not the relevant acts or omissions occurred prior to this Agreement entering into force.
- (3) Each of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event the Agreement shall cease to have effect three months after the date of the receipt of that notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

DONE at Sydney, Australia, this twenty-third day of September one thousand nine hundred and ninety six, in Chinese and English, both texts being equally authentic.

FOR THE GOVERNMENT
OF HONG KONG

FOR THE GOVERNMENT
OF AUSTRALIA

**Cases handled by the Complaints Against Police Office and
endorsed⁽¹⁾ by the Independent Police Complaints Council**

(A) Nature of allegations⁽²⁾

Nature of allegations	1995	1996	1997
(1) Assault	1,780 (38.4%)	1,600 (31.7%)	1,324 (27.3%)
(2) Overbearing/impolite conduct	1,189 (25.7%)	1,460 (28.9%)	1,485 (30.6%)
(3) Neglect of duty/improper action	696 (15.0%)	854 (16.9%)	919 (18.9%)
(4) Unnecessary use of authority	431 (9.3%)	488 (9.6%)	469 (9.7%)
(5) Fabrication of evidence	272 (5.9%)	363 (7.2%)	362 (7.5%)
(6) Threat	183 (4.0%)	201 (4.0%)	201 (4.1%)
(7) Other offences	76 (1.6%)	84 (1.67%)	85 (1.8%)
(8) Police procedures	6 (0.1%)	2 (0.03%)	9 (0.2%)
Total:	4,633	5,052	4,854

Note⁽¹⁾ : In this context, ‘endorsed’ means that, having examined the findings of CAPO investigations, the IPCC agrees with them. If it does not, the Council can ask CAPO to clarify areas of doubt or to reinvestigate the complaint.

Note⁽²⁾ : A complaint may comprise more than one allegation.

(B) Results of investigations

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

Practice Direction

Part IIIA of the Criminal Procedure Ordinance (Cap. 221)
as amended By the Criminal Procedure (Amendment) Ordinance,
No. 69 of 1995

1. These procedures cover applications for leave to call evidence by way of:
 - (a) live television link (under S.79B) where the witness is a child or mentally handicapped or in fear,
 - or (b) video recorded testimony (under S.79C) in the case of witnesses who are either children or mentally handicapped,and in accordance with the provisions of the Live Television Link and Video Recorded Evidence Rules made under S.79D.
2. Cases involving vulnerable witnesses should be given priority for listing purposes.
3. Hearings to determine applications under S.79B.(2), (3) and (4) will take place while the Court is sitting in Chambers.
4. Where the Court grants leave to admit a video recording under S.79C but directs that a part of the recording is to be excluded, the party applying to have the recording admitted is responsible for the editing of the video tape in accordance with the Court's directions. The edited copy together with the amended transcript pages should then be supplied to the appropriate officer of the Court and to all parties in the proceedings in advance of the trial.

5. On the day of trial, in order to avoid additional stress being suffered by any vulnerable witness, there should be no postponement except in the most exceptional circumstances. All preliminary issues that might otherwise delay the start of the trial should have been dealt with in advance or, alternatively, notified to the parties concerned and to the Court, at least 7 days before the commencement of trial so that arrangements can be made to obviate vulnerable witnesses coming to Court on days or at times when it is unlikely that they will be needed.
6. Whenever a witness as defined in paragraph 1(a) above gives evidence, a Court usher will be present to -
 - (a) operate the closed circuit television (C.C.T.V.) in the witness room;
 - (b) explain to the witness what to do and where to sit;
 - (c) ensure there is no improper communication between the witness and the supporting person (if any);and (d) supervise in a general way so that the witness is properly looked after.
7. Where the witness is a child or is mentally handicapped, a 'support person' may also be present with the permission of the Court. That person should not be a witness in the case and should not have been directly involved in the investigation of the case. In the case of a mentally handicapped witness, the 'support person' should be someone with some understanding and expertise related to the nature of the handicap. In all cases, the Judge must warn the 'support person' not to prompt or seek to influence the witness in any way. (See also *R. v. Chan Wai* (1994) 2 HKCLR 75).
8. There should normally be no need for any person other than the witness and

the Court usher to be inside the C.C.T.V. witness room in a case where the witness is in fear.

9. The Judge will ensure that:

(a) no intimidating practices are adopted in the course of questioning;

(b) no inappropriate language is used having regard to the age and mental capacity of the witness,

and (c) that breaks are offered or given to a witness at regular intervals, if appropriate.

10. Where a defendant is not represented and wishes to ask questions of any vulnerable witness, the Judge in his discretion may permit:

(a) the picture to be switched off on the monitor in the C.C.T.V. witness room allowing only the defendant's voice to be heard by the witness;

or (b) the questions to be channelled through another person (including the Judge),

if the Judge feels that the impact of cross-examination will be too inhibiting or threatening to allow the witness to answer freely.

11. The Judge will decide whether gowns and/or wigs should be removed while a child or handicapped person gives evidence.

12. Where a witness who is in fear is to give evidence, it will be the responsibility of the Police to arrange for the security of the witness at Court and, if special arrangements are to be made which encroach upon the normal working arrangements at Court, the appropriate officer of the Court must be

given advance notice of what it is proposed so that a course of action can be agreed.

13. Where it is believed that the safety and security of the Court is itself in jeopardy as a result of the presence of a witness in fear, it will be the responsibility of the police to ensure that no risks are taken.
14. Where special arrangements are made, as shown in paragraphs (12) and (13) above, the officer of the Court will be responsible for keeping the Judge informed of the situation.

Dated this 13th day of February 1996.

T.L. Yang
Chief Justice