SEX DISCRIMINATION IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION: THE SEX DISCRIMINATION ORDINANCE, THE EQUAL OPPORTUNITIES COMMISSION, AND A PROPOSAL FOR CHANGE

I. INTRODUCTION

In China, women have historically been considered property and could be sold or divorced for various reasons, including poverty, failure to bear male children, or failure to obey elder members of the family.[1] Therefore, the citizens of Hong Kong, especially the women, took seriously Hong Kong's reversion to Chinese control. In an attempt to eliminate the potential for Chinese abuse, women's groups joined together and lobbied the pre-reversion Hong Kong government for reform.

For the most part, the women's groups were successful in initiating reform. As a result of their determination, the Hong Kong legislature passed the Bill of Rights Ordinance and the Sex Discrimination Ordinance. Despite setbacks, the Ordinances have proved useful in the battle against sex discrimination. The Hong Kong courts have favorably interpreted the Ordinances and Hong Kong women currently enjoy an improving lifestyle. Nevertheless, the Sex Discrimination Ordinance needs improvement and the establishment of a women's commission is necessary in order to protect the interests of Hong Kong women.

II. PRE-REVERSION BACKGROUND OF HONG KONG

The Hong Kong Special Administrative Region (HKSAR) consists of Hong Kong Island, the Kowloon Peninsula, and the New Territories. Hong Kong is located on the southeastern coast of China. It consists of 236 islands and part of the Chinese mainland (the "New Territories").[2]

Great Britain obtained Hong Kong in three stages.[3] The first stage, the acquisition of Hong Kong Island,[4] occurred as a result of a trade dispute over opium.[5] The hostilities were aptly labeled the First Opium War. As a result of the hostilities, British merchants and their families were expelled from

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1. *See* Veronica Pearson, *The Past in Another Country: Hong Kong Women in Transition*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 92 (1996). Some of the reasons women could be divorced or sold include contracting a disease and "being too garrulous." *Id.* Female children could also be sold as indentured servants. *See id.*

2. Peter Lesser, *The Legal System of Hong Kong*, *in* MODERN LEGAL SYSTEMS CYCLOPEDIA: PACIFIC BASIN § 2.40.3 (Redden ed. 1989).

3. *See id.* § 2.40.8.

4. *See id.*

5. *See id.*

several important Chinese trading ports.[6] Therefore, the merchants and their families fled to the virtually deserted offshore island of Hong Kong.[7] The Chinese, in an effort to push military activity away from the mainland, offered possession of Hong Kong Island to the British.[8] Hong Kong Island was ceded "in perpetuity"[9] to Great Britain in 1841.[10] The 1842 Treaty of Nanking confirmed the agreement.[11] The British envisioned Hong Kong Island as a trading post and diplomatic headquarters for negotiations with China because there was not an extensive indigenous population, and the island was not expected to attract enough people to form a significant European community.[12]

During the second stage, due to increasing hostilities between China and Great Britain, the British obtained the Kowloon Peninsula in 1860 pursuant to the Convention of Peking.[13] British troops occupied the Peninsula in 1856 in an effort to strengthen and safeguard the British military presence on Hong Kong Island.[14]

The third and final acquisition, in 1898, was due to Sino-British negotiations. As a result of the negotiations, the New Territories were leased to Great Britain for a period of ninety-nine years.[15] The British viewed the New Territories as a buffer zone around their existing possessions in South China.[16] However, unlike Hong Kong Island and the Kowloon Peninsula, the New Territories contained a significant indigenous population.[17]

Nevertheless, the Chinese considered the various agreements ceding Hong Kong to the United Kingdom invalid.[18] The Chinese view these agreements as unfair because they were a result of unequal bargaining power and were essentially forced upon them by a superior power.[19] Regardless, the British control of Hong Kong continued without any major incidents throughout the early 20th Century.[20] While under British control, many Mainland Chinese citizens fled to Hong Kong because of the political instability in China.[21] However, during World War II Japanese troops

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6. *See id.*
7. *See id.*
8. *See id.*
9. Webster's Dictionary defines perpetuity as an "endless duration; something of which there will be no end." WEBSTER'S DICTIONARY 166 (1992).
10. Lesser, *supra* note 2, § 2.40.8.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.* § 2.40.9.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*

occupied Hong Kong.[22] As a result, many Hong Kong citizens (formerly Chinese citizens) fled back to the mainland during World War II to escape the Japanese occupation of Hong Kong Island.[23] Despite the Japanese occupation, Hong Kong made an impressive economic recovery after World War II with the aid of British grants.[24]

In the past thirty-five years, Hong Kong has experienced tremendous social and economic growth. Hong Kong has established itself as an international trading post and has incorporated expansive banking, finance, and commercial ventures.[25] Hong Kong functions as a laissez-faire[26] economic system and is export-oriented.[27] The United States is Hong Kong's chief economic importer, with the United Kingdom, Germany, and Japan slightly behind.[28] Moreover, because of its proximity and large population, China represents the most expansive market for Hong Kong exports.[29]

The anticipation of the reversion to Chinese control in 1997 created tension and apprehension in Hong Kong. However, as discussed below, Hong Kong currently flourishes economically under the Chinese model of "one country, two systems"[30]; nevertheless, there is room for improvement in the area of human rights - especially women's rights.[31]

A. Traditional Treatment of Hong Kong Women

Chinese culture and custom have heavily influenced the traditional treatment of Hong Kong women. The Chinese viewed women as "goods on which one loses" since women were destined at birth to be married into another family that would benefit from their labor and reproductive capacities.[32] As a result, Hong Kong women faced deeply rooted societal discrimination - discrimination that would prove hard to overcome.

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22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. Laissez-faire means "[a] letting alone, non-interference." WEBSTER'S DICTIONARY 129 (1992). In other words, the government lets the economy run itself with little or no government intervention.

27. The Hong Kong economic system is export-oriented because Hong Kong has a small population, and production greatly outweighs the demand by the Hong Kong population. Therefore, Hong Kong exports its goods to larger countries whose population has an increased demand for their products. *See* Lesser, *supra* note 2, § 2.40.9.

28. *See id.* § 2.40.11.

29. *See id.*

30. China's approach to the reversion was of creating "one country" with "two systems." Hong Kong would no longer be a separate country; however, it would maintain its capitalist economic system. *See generally* MICHAEL C. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG (1990).

31. *See generally* Pearson, *supra* note 1.

32. *Id.* at 92.

B. Prohibition of Female Inheritance of Land in the New Territories

The prohibition of female inheritance of New Territories land was deeply rooted - the prohibition began years before Great Britain obtained the territory. Britain leased the New Territories from China for ninety-nine years beginning in 1898.[33] Since the New Territories would eventually revert to Chinese control, unlike Hong Kong Island and Kowloon Peninsula which were ceded to Britain in perpetuity, the British felt obligated to preserve the native customs of the people in the New Territories. Hence, Section 13 of the New Territories Ordinance states that "the court shall have the power to recognize and enforce any Chinese custom or customary right . . . ."[34]

Chinese customary law required land to be passed down the male line, effectively denying females the right to inherit land.[35] Section 13 of the New Territories Ordinance specifically requires the application of Chinese customary law in any proceeding dealing with New Territories land.[36] Therefore, women in the New Territories have been denied the right to inherit land for almost a century.[37]

The "Small House Policy"

The small house policy, a social welfare policy, was created in 1972 to encourage rural New Territories residents to remedy the housing shortage by moving into the urban developments - the "New Towns."[38] The policy allows an indigenous villager to apply for a free building license to erect a house on his own land or to be granted a building site on government owned land for a premium.[39] However, the policy defines an indigenous villager as a male, at least eighteen years old, who is a descendent of an 1898 male resident from a recognized village.[40]

The Hong Kong Government continues to support this policy despite its invidious discrimination against women and non-villagers. Justifying its policy, the government reasons that the small house policy "reflects the

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33. *See* Lesser, *supra* note 2, § 2.40.8.

34. Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996).

35. A female could not inherit land from her parents or spouse even if it was specifically left to her in a last will and testament. The land would go to her surviving brother(s) or son(s). *See id.* at 342.

36. *See id.* at 341.

37. After many years of lobbying by women's groups in Hong Kong, the ban on female inheritance of land in the New Territories was repealed in June 1994 (discussed in Part III below). *See id.* at 339. *See also* Pearson, *supra* note 1.

38. Petersen, *supra* note 34, at 343.

39. *See id.*

40. *See id.*

traditions and customs of the New Territories indigenous communities, where heads of households have traditionally been almost exclusively male and female villagers have moved away from their villages upon marriage."[41]

C. *Discrimination in Rural Elections and Consultative Bodies*

In the New Territories, women have traditionally been discriminated against in the electoral process. In 1993, one-third of approximately 690 villages in the New Territories precluded women from running for election as a Village Representative.[42] Many of the villages also excluded women from voting either expressly or by permitting only the head of the household to vote - always defined as a male.[43] This invidious discrimination has resulted in only one woman serving in the capacity of a Village Representative and created the precipitous effect of discrimination since the next level of officers are selected from the ranks of the Village Representatives.[44]

The male-dominated advisory body on New Territories matters, the Heung Yee Kuk, wields enormous power and has steadfastly opposed reforms to address sex discrimination.[45] This might explain why, in 1993, only 4 of the 143 Heung Yee Kuk counselors were females.[46]

D. *Miscellaneous Laws that Encourage Sex Discrimination*

According to the Marriage Ordinance, only a father may consent to the marriage of a child between the ages of sixteen and twenty-one.[47] Several "protective" laws restricting women's employment encourage employers to discriminate against women. For example, a sixteen-year-old man may work in an establishment that serves liquor, but a woman may not do so until she is eighteen.[48] Another example of a "protective" law is the prohibition against

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41. *Id.* at 343-44 (citing Hong Kong Government, The New Territories Small House Policy, Legco Paper No. 729/93-94, app. I, para. 11). The government is heavily influenced by the Hueng Yee Kuk the male dominated advisory body on New Territories affairs. The power of this male dominated body might explain why preserving the traditions and customs of the indigenous villagers is so important to the government. The Hueng Yee Kuk is notorious for its opposition to gender equality in the New Territories. *See id.* at 344.

42. *Id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *Id.* This trend continues although Section 35 of the Sex Discrimination Ordinance effectively outlaws sex discrimination in voter eligibility and election or appointment to government advisory bodies (discussed in Part III below). Sex Discrimination Ordinance, Cap. 480 § 35 (1997).

47. If the father is dead or insane, the mother may consent. *See id.* at 345. (citing Marriage Ordinance, Cap. 181 Laws of Hong Kong § 14).

48. *See* Petersen, *supra* note 34, at 345 (citing Commodities Regulations, Cap. 59 Laws

"women . . . work[ing] underground, in any tunneling operation, or in any dangerous trade."[49] Although the laws appear to protect women, in reality they pigeonhole women into job classifications.

E. Discrimination in Employment

Only nineteen percent of the administrative and managerial workers in Hong Kong are women[50] compared to the more than two-thirds of clerical jobs performed by women.[51] In the past, newspapers published job advertisements for "male engineers," "male accounts supervisors," and "female clerks" in an effort to make clear the hierarchy that exists at a company.[52] For example, managerial positions are often reserved for men.[53] Additionally, teaching, a profession that traditionally employs a majority of women, lacks a significant female presence in post-secondary education.[54] Moreover, women are frequently paid less than men for performing the same or similar work.[55]

III. TRANSITIONAL PERIOD

A. Joint Declaration Between China and the United Kingdom

Against the background of rampant sex discrimination and after two years of negotiations, China and the United Kingdom signed the Joint

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of Hong Kong §§ 4,5).

49. *Id.*

50. *The World's Women 1995: Trends and Statistics*, United Nations Fourth Conference on Women (1995).

51. Harriet Samuels, *Women and the Law in Hong Kong: A Feminist Analysis*, *in* HONG KONG, CHINA AND 1997 ESSAYS IN LEGAL THEORY 80 (1993).

52. Petersen, *supra* note 34, at 347.

53. "In almost any work environment, women are less preferred as workers because it is assumed that they will take maternity leave, will stay away from work when their child is sick, and will be able to devote less energy to their labors because of their household responsibilities." *Id.*

54. In 1987, 99% of kindergarten teachers, 75% of primary-school teachers, and 28% of teachers at the post-secondary level were female. Samuels, *supra* note 51, at 80 (quoting Grace C. L. Mak, *The Schooling of Girls in Hong Kong Progress and Contradictions*, *in* EDUCATION AND SOCIETY IN HONG KONG: TOWARD ONE COUNTRY AND TWO SYSTEMS 167-80 (Gerard A. Postiglione ed. 1992)).

55. *See* Samuels, *supra* note 51, at 81 (citing Carole J. Petersen, Failure of the Hong Kong Government to Enact Legislation Prohibiting Discrimination in Employment, in *Report by the Hong Kong Council of Women on the Third Periodic Report by Hong Kong Under Article 40 of the International Covenant on Civil and Political Rights* March 1991 (unpublished)). *See also* Anne Cheung, *Pay Equity for Hong Kong: A Preliminary Exploration*, 25 HONG KONG L.J. 383, 384 (1995) (stating that "Wage disparity is one quantifiable measure of sexual inequality. It is also one of the more blatant forms of sexual discrimination in Hong Kong. . . [I]n March 1994, the nominal overall monthly salary [was] $7,596 for women compared with $9,172 for men.").

Declaration regarding the future status of Hong Kong on September 24, 1984.[56] The Joint Declaration insured that the reversion to Chinese control on July 1, 1997 would not undermine Hong Kong's success as a major trading, manufacturing, and industrial partner.[57] The Joint Declaration sought to have Hong Kong continue functioning as it did under British law with a liberal, capitalist, common law framework – only under Chinese control. Thus, the phrase "one country, two systems" accurately depicted the new regime. China and Hong Kong would become one country; however, Hong Kong would continue its traditions of free trade, a high degree of autonomy and self-government, and use of the common law legal system.[58]

B. The Basic Law

The Basic Law ensured the implementation of the basic policies contained in the Joint Declaration. A Basic Law Drafting Committee was established and consisted of members from Mainland China and Hong Kong.[59] The United Kingdom was not involved. The most contentious issues facing the committee were those not clearly spelled out in the Joint Declaration.[60] The National People's Congress adopted the Basic Law on April 4, 1990, but the law did not come into effect until July 1, 1997.[61] Ultimately, the Basic Law incorporated some of the positive features of the Joint Declaration but failed to strengthen the democratic nature of Hong Kong institutions and limited the autonomy Hong Kong had hoped to express.[62] Several areas of the Basic Law arguably conflict with the Joint Declaration.[63]

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56. *See Generally* YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER (1999) (discussing the series of negotiations between China and the United Kingdom).

57. *See generally* Davis, *supra* note 30.

58. *See id.* at 5-6.

59. *See id.* at 6.

60. These issues include: the scope of the application of the Chinese Constitution, residual powers, provisions for the interpretation of the Basic Law, and the political system. *See* Ghai, *supra* note 56, at 61-63.

61. *Id.*

62. "The Basic Law, like the curate's egg, was good in parts. China showed some sympathy to Hong Kong's tradition of law and social organization. It made several concessions to the Hong Kong position." *Id.* at 64.

63. Areas of incompatibility include: definitions of the words "elections" and "accountability" (both have differing meanings in Hong Kong, China, and the rest of the world); scheme for the interpretation of the Basic Law; restriction on the powers of the HKSAR courts; division of powers; additional qualifications for certain officers that did not appear in the Joint Declaration; reduction of the rights and freedoms of HKSAR residents; and Chinese mainland intervention in Hong Kong affairs. *See id.* at 67-69. *See also* Davis, *supra* note 30.

C. *Passage of the Hong Kong Bill of Rights*

The Basic Law protects individual rights in two limited ways. First, it lists a specific number of rights enjoyed by Hong Kong citizens.[64] Second, it expressly incorporates the provisions of the United Nations International Covenant on Economic, Social, and Cultural Rights[65] and the International Covenant on Civil and Political Rights.[66] However, in light of China's record on human rights, especially women's[67] rights,[68] and the 1989 Tiananmen

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64. Rights available under the Basic Law include: equality before the law; freedom of speech, press, and publication; freedom of association; freedom of assembly; freedom to join trade unions and strike; freedom and liberty of the person; prohibition of torture; prohibition of unlawful or arbitrary deprivation of life; privacy of person and home; freedom of movement; freedom of conscience and religious belief and practice; freedom of occupation; right to engage in academic research, literacy and artistic creation and other cultural activities; freedom of marriage and the right to raise a family; protection of the law and legal process; presumption of innocence; right to a speedy and fair trial; common law procedural safeguards in civil and criminal trials; right to own and enjoy property and protection against its confiscation without compensation; and the right to social welfare. *See* The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, arts. 27-38. *See also* GEORGE EDWARDS, HONG KONG'S BILL OF RIGHTS: TWO YEARS BEFORE 1997 (1995).

65. International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

66. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 (declaring that "[a]ll peoples have the right of self-determination" and, consequently, peoples have the right to "freely pursue their economic, social, and cultural development.").

67. "A [Chinese] woman who attempts to buck tradition and challenge the role assigned her by society usually finds herself at best misunderstood and, at worst, ostracized by her community." Vivien Ng, *Sexuality, Gender and Social Scripting in Japan and China*, 4 YALE J.L. & FEMINISM 65, 71 (1991).

68. In China, women were traditionally treated as inferior to men. This tradition is exemplified in the following ways:

> Possessing no political rights, women were completely excluded from social and political life. Economically dependent [on men] women were robbed of property and inheritance rights and possessed no independent form of income. Having no social status, women were forced to obey their fathers before marriage, their husbands after marriage and their sons if they became widowed. Women had no personal dignity or independent status, and were deprived of the right to receive education and take part in social activities. They enjoyed no freedom of marriage but had to obey the dictates of their parents and heed the words of matchmakers, and were not allowed to remarry if their spouse died. [Women] were subjected to physical and mental torture, being harassed by systems of polygamy and prostitution, the overwhelming majority of women were forced to bind their feet at childhood.

The Situation of Chinese Women, *available at* http://www.chinese-embassy.org.uk/Hot-Issues/Situation-of-Chinese/wpwomen.htm (last visited Nov. 8, 2000). In modern China, Chinese scholars have acknowledged that "development has led to violence against women," that "reform has made females second-class citizens in jobs, education and career promotions," and that "sixty percent of the population before the poverty line is composed of women and children." Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216

Square incident,[69] Hong Kong citizens remained unconvinced that the Basic Law adequately protected their individual rights. In response, the Hong Kong Government enacted the Bill of Rights Ordinance in June 1991. The Ordinance specifies many additional rights that Hong Kong residents enjoy in order to compensate for the inadequacies of the Basic Law's enumeration of individual rights.[70]

Nevertheless, the Bill of Rights Ordinance proved inadequate in eliminating gender discrimination in both the private and public sectors. First, the Ordinance binds only the government and public authorities.[71] Therefore, the Ordinance cannot be applied to a dispute between private parties even if one party alleges that a violation of the Bill of Rights Ordinance has occurred as a result of another party's actions.[72] Second, the

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(1996); *Cf. The Situation of Chinese Women, available at* http://www.chinese-embassy.org.uk/Hot-Issues/Situation-of-Chinese/wpwomen.htm (last visited Nov. 8, 2000)(finding that "China has made active endeavors in promoting equality between men and women and safeguarding the legitimate rights and interests of women."). For more information on China's human rights record see Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216 (1996).

69. "Public concern reached its height in the summer of 1989, immediately after the massacre in Beijing's Tiananmen Square. In Hong Kong, more than one million people (almost 20% of the population) marched in the streets in condemnation of the massacre. Not surprisingly, public confidence in the future of Hong Kong after 1997 'sank to an all-time low.'" Petersen, *supra* note 34, at 349-50.

70. These rights are: entitlement to the rights of the Ordinance without discrimination such as those based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; right to life; prohibition of torture, inhumane treatment, slavery or imprisonment for inability to fulfill a contractual obligation; right to liberty and security of the person; right of persons deprived of their liberty to be treated with humanity and respect; right to liberty of movement; right to a fair hearing before expulsion from Hong Kong; equality before the courts and the right to a fair and public hearing; prohibition of retrospective criminal offenses or penalties; right to recognition as a person before the law; protection of privacy, family, home, correspondence, honor, and reputation; freedom of thought, conscience, religion, association, opinion, and expression; right of peaceful assembly; right to marry and found a family, prohibition of forced marriages, and equal rights of spouses in marriage; right of every child to the protection of law as justified by his or her status, to registration after birth, and to a name; right of every permanent resident to take part in the conduct of public affairs, directly or through chosen representatives; right to vote and contest elections; right to have equal access to public service; right of minority communities to enjoy their own culture, profess their religion, and use their own language; and equality before and equal protection of the law, so that there may be no discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *See* Bill of Rights Ordinance, Cap. 383 (1991). *See also* EDWARDS, *supra* note 64.

71. *See* Bill of Rights Ordinance, Cap. 383 § 7 (1991).

72. *See* Petersen, *supra* note 34, at 357-58; *see also Submission by Hong Kong Human Rights Monitor in Respect of the Hong Kong Special Administrative Region's Initial Report on the Hong Kong Special Administrative Region under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, available at* http://www.hkhrm.org.hk/english/reports/cedaw.html (last visited Nov. 8, 2000).

cost of litigation, the difficulty in finding legal aid, the ethical limitations placed on lawyers in Hong Kong, and the nature of litigation as a whole make it virtually impossible for women to challenge sexually discriminatory laws.[73] Finally, the Hong Kong Government refused to comply with the Bill of Rights Ordinance by failing to repel or change discriminatory policies such as the rule against female inheritance, the small house policy, and the "protective" regulations.[74]

D. Women's Movement

Frustrated with the Hong Kong Government's inaction regarding sex discrimination, many Hong Kong women united and began lobbying the Legislative Council for reform. Disappointed in the Bill of Rights Ordinance's lack of protection for women, women's groups criticized the Government and accused it of "reneging on its promise."[75] In response, the Government formed an "Inter-departmental Working Group on Sex Discrimination."[76] The group was to determine whether sex discrimination was a problem in Hong Kong and, if so, to recommend governmental measures to remedy the problem.[77] The Working Group concluded, "the problem [of sex discrimination] is not serious in Hong Kong."[78] Noting that sex discrimination legislation would likely have an adverse impact on the Hong Kong economy, the Working Group concluded that sex discrimination legislation did not need to be introduced.[79] Although the findings of the Working Group greatly disappointed women's organizations, the debate and attention increased the public's awareness of women's rights and the lack thereof in Hong Kong.[80]

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73. Legal fees in Hong Kong are among the highest in the world, lawyers are prohibited from working on a contingency fee basis, and if a Plaintiff brings a legal action and loses she is likely to be held liable for the defendant's legal fees as well as her own. *See* Petersen, *supra* note 34, at 358.

74. *Id.* at 359.

75. *Id.* The Government had made promises that the Ordinance would take action against discrimination. However, according to women's groups, the government did not fulfill the promise. *See id.*

76. *Id.*

77. *See id.*

78. *Id.* "The [Working Group's] Findings consisted of six double-spaced pages, with no footnotes or specific sources cited other than the 1981 and 1991 Population Censuses. The Working Group referred only to unnamed 'surveys,' which it claimed showed that only a small proportion of Hong Kong women perceive themselves to be victims of discrimination." *Id.* at 360.

79. *See id.* at 360-61.

80. *See id.* at 361.

E. *Repeal of the Ban on Female Inheritance of Land in the New Territories*

Under political pressure, the Hong Kong Legislative Council repealed the prohibition of female inheritance of New Territories land in 1994. Less than three months after the government issued the Green Paper,[81] the government attempted to apply a "quick fix" to remedy the discrimination problems in the New Territories by proposing the New Territories Land (Exemption) Bill.[82] The Bill continued to prohibit female inheritance of rural New Territories land, and declared, retroactively, that the prohibition on female inheritance of urban land was abolished.[83] However, women's organizations "condemned the proposal as a deliberate effort to isolate rural women and fossilize forever the discrimination against them."[84]

In response to the criticism of the government's bill, Christine Loh, an appointed member of the Legislative Council, proposed an amendment to the bill that would allow any landowner to leave land to either male or female heirs by executing a will.[85] Not surprisingly, Loh's amendment faced sharp criticism from the Heung Yee Kuk and conservatives in the New Territories who favored maintaining the status quo.[86] Nevertheless, public opinion polls indicated that the majority of Hong Kong citizens supported the Loh amendment.[87] Ultimately, the New Territories Land (Exemption) Ordinance

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81. A Green Paper is a formal consultative document used to inform the public about areas of special concern or proposed legislation. *See id.* Again, the women's movement was unhappy with the Government's findings in the Green Paper. The Green Paper devoted little time to the most blatant problems of discrimination in the New Territories – the ban of female inheritance of land and the "small house" policy. In addition, the Green Paper refused to acknowledge that sex discrimination was a major factor in the disparity between salaries of women and men. "Fortunately, the public read the Green Paper with a skeptical eye. Despite the government's effort to understate the extent of discrimination, the submissions made in response to the Green Paper indicated significant public support for action against sex discrimination . . . ." *Id.* at 366.

82. *Id.*

83. *See id.*

84. *Id.* at 370.

85. *See id.*

86. Petersen states,

> The United Democrats pledged to endorse Loh's amendment and one member of the party was assaulted by protesters on his way to a Legislative Council session. Women who demonstrated in favor of the amendment also claimed that they were assaulted, and some women demonstrators reported that they were afraid to return to their villages in the New Territories.

Id. at 370-71.

87. *See id.* at 371. (citing *Loh's Popularity Soars Over Stance on Inheritance Laws*, SOUTH CHINA MORNING POST (H.K.), Apr. 2, 1994 (reporting that "[a] poll taken by Hong Kong polling and business research showed that 64% of respondents supported the amendment; 24% were unsure and 12% opposed it.")).

passed in June 1994, with Loh's amendment.[88]

F. *Adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

Women's organizations had been advocating the extension of the CEDAW[89] to Hong Kong for years.[90] Finally, in November, 1991, Emily Lau, a member of the Legislative Council and a strong advocate for women's rights, helped form a legislative group to study women's issues. In December 1992, Lau introduced a proposal[91] encouraging the government to extend the CEDAW to Hong Kong. The Administration "cautioned that Hong Kong should not make a hasty decision on [the] CEDAW and that 'the administration doubts the wisdom of extending [the] CEDAW to Hong Kong forthwith.'"[92] However, the Legislative Council strongly favored the

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88. *See id.*

89. *See id.* The Convention on the Elimination of All Forms of Discrimination stated,

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation . . . ; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure . . . the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and (g) To repeal all national penal provisions which constitute discrimination against women.

The Convention on the Elimination of All Forms Of Discrimination Against Women, 1979, pt.1, art. 2.

90. The United Kingdom ratified the CEDAW in 1986, but it was not extended to Hong Kong pursuant to the Hong Kong Government's request. *See* Petersen, *supra* note 34, at 364. "[T]he Hong Kong government stated that it needed to study the implications of CEDAW before deciding whether, and on what terms, CEDAW should be extended to Hong Kong. In the late 1980's, women's organizations pressed the government to make a decision on CEDAW, but the government staunchly refused to do so." *Id.*

91. The proposal stated: "this Council calls upon the Administration to support the extension to Hong Kong of the United Nations Convention of the Elimination of all Forms of Discrimination Against Women and to request the British Government to take the necessary action to so extend the Convention forthwith." *Id.* at 363. (citing *Hong Kong Legislative Council Official Record of Proceedings*, Dec.16, 1992, at 1451).

92. *Id.* at 365. The administration opposed the adoption of CEDAW because the Convention expressly required the government to repeal existing discriminatory policies and statutes. The adoption would require a complete overhaul of the "small house" policy and many

proposal and passed it unanimously with suggestions for the actual implementation of the CEDAW.[93] After a four-year delay, the CEDAW was formally extended to Hong Kong in 1996.

G. *Passage of the Sex Discrimination Ordinance*

The Government introduced the Sex Discrimination Bill in October, 1994, in response to and in fear of a much more comprehensive bill supported by Legislative Council member Anna Wu.[94] The original submission by the Government was extremely conservative and lacked several important provisions.[95] Recognizing that her bills might not be heard in the Legislative Council,[96] and (if they were heard) would only have a marginal chance of passing, Wu decided to propose amendments to the Government's submission in order to remedy the shortcomings.[97] Because of Wu's persistence, a few additional amendments to the Government's Sex Discrimination Bill were passed.[98]

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other laws that treated women unequally. In addition, the government was fearful that new laws prohibiting unequal pay for equal work would adversely impact Hong Kong's free market economy. *See id.*

93. The Legislative Council called for "the actual implementation of CEDAW through substantive reforms, including anti-discrimination legislation, a women's commission, and reform of discriminatory laws." *Id.*

94. Anna Wu introduced the Equal Opportunities Bill, which sought to prohibit discrimination on the basis of sex, marital status, pregnancy, family responsibility, disability, sexuality, race, age, political and religious conviction, and spent conviction. *See id.* at 372. The bill provided for an independent public body responsible for the promotion and enforcement of the rights contained in the bill. *See id.*

95. The government's submission addressed discrimination on the grounds of pregnancy and marital status in employment situations but ignored those forms of discrimination in education and housing. In addition, the bill lacked a specific provision prohibiting discrimination in the enforcement of law and administration of government programs and lacked a provision prohibiting age discrimination. Nothing in the government's bill outlawed discrimination in elections or appointments to public office. Most significantly, the government's bill created a special exemption to the bill for the "small house" policy. *Id.*

96. *See id.* Petersen also states,

> Under Hong Kong's colonial constitution, a member of the Legislative Council must obtain express permission from the Governor before she may propose any bill 'the object or effect of which may be to dispose of or charge any part of [o]ur revenue arising within the colony. . . .' Thus, in addition to the Governor's power to refuse assent to any bill passed by the Legislative Council . . . the Governor also has the power to prevent the Legislative Council from even considering bills that require the expenditure of public funds.

Id. at 373-74.

97. *See id.* at 380.

98. *See id.* The following amendments were added to the Government's Sex Discrimination bill: (1) A provision prohibiting discrimination in all elections and appointments to public office; (2) The exemption for "protective regulations" was limited to one year; (3) The provisions relating to marital status and pregnancy were expanded to cover areas other than

Unfortunately, the Legislative Council voted down both an amendment to compel the Government to bring the Sex Discrimination Ordinance into effect by January 1, 1996 and an amendment limiting the exemption for the "small house" policy to one year.[99] In addition, the Council voted down an amendment adding the remedy of reinstatement[100] and approved a last minute amendment limiting damages for sex discrimination to $150,000 regardless of the amount of actual damages.[101] With these changes, the Sex Discrimination Ordinance was enacted with substantive enforcement provisions including a commission to enforce the Ordinance - The Equal Opportunities Commission.

H. Establishment of the Equal Opportunities Commission

The long overdue Equal Opportunities Commission (EOC)[102] was established on May 20, 1996.[103] The EOC seeks to "create, with the support of the community, an environment where there is no barrier to equal opportunities and no discrimination."[104] The EOC seeks to achieve its mission by promoting equality of opportunity between men and women; eliminating gender discrimination through legislative provisions, administrative measures, and public education; and eliminating sexual harassment.[105] The EOC drafted strategies[106] and a list of commitments[107] to

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just employment; (4) A provision expressly prohibiting "hostile environment" harassment in employment and "student to student" harassment in education; and (5) The exemption for small businesses was shortened to three years. *See id.* at 381-82.

99. *See id.* at 383.

100. Reinstatement would have allowed a victim of discrimination to get his/her job back.

101. *Id.* However, the amendment limiting damages to $150,000 originally contained in Section 76(7) of the Ordinance was repealed in 1997. Sex Discrimination Ordinance, Cap. 48 § 76 (1997).

102. The EOC is a statutory body set up to work towards the elimination of discrimination and promote equality of opportunity with specific reference to gender, disability and family status. It consists of a full-time Chairperson, Anna Wu, and 16 members of the public from different sectors including employment and labor, law, women's concerns, and rehabilitation. The EOC is charged with implementing the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, and the Family Status Discrimination Ordinance. The primary focus of this note is on the Sex Discrimination Ordinance. Equal Opportunities Commission, *Introduction, available at* http.// www.eoc.org.hk/about/about.html (last visited Nov. 8, 2000); *see also* Sex Discrimination Ordinance, Cap. 480 § 63 (1997).

103. *See id.*

104. Equal Opportunities Commission, *available at* http:// www.eoc.org.hk/about/about.html (last visited Nov. 8, 2000). *See also* Sex Discrimination Ordinance, Cap. 480 § 64 (1997).

105. *See id.*

106. The EOC's strategies are: "securing compliance and reform through legislative means[,] [p]romoting education to raise awareness and achieve change[,] [s]trengthening communication with community organizations to promote participation[,] [b]uilding corporate partnerships to encourage practices and prevention[,] [and] conducting research to guide our

the Hong Kong people to exemplify its duty to fulfill its mission.[108]

The Sex Discrimination Ordinance[109] empowers the EOC to investigate complaints related to any allegedly unlawful act and to effect settlement by conciliation.[110] The EOC may also conduct formal investigations on any act made unlawful by the Ordinance and may issue enforcement notices.[111]

Section 65 of the Sex Discrimination Ordinance states "[t]he Commission may undertake or assist (financially or otherwise) the undertaking by other persons of any research, and any educational activities, which appear to the Commission necessary or expedient for the performance of its functions."[112] In September, 1996, prior to the implementation of the Sex Discrimination Ordinance, the EOC commissioned a survey[113] to determine the focus of the Commission.[114] In general, the survey determined that print and television media tend to discriminate against women more than

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future direction." *Id.*

107. EOC's commitments to the People of Hong Kong are to:

> handle enquiries, complaints, and conciliation fairly, effectively, and efficiently[;] assist aggrieved persons in obtaining information and advice, and provide conciliation or assistance in proceedings[;] initiate formal investigations in the public interest[;] coordinate and communicate with government and non-government organizations on issues of equal opportunities[;] build up corporate partnership to promote equal opportunity policies and codes of practice[;] create better understanding of discrimination and inequality through research and public education[;] issue codes of practice and guidelines on elimination of discrimination and promotion of equal opportunities[;] [and] review the Sex Discrimination Ordinance . . . and propose appropriate amendments.

Id.

108. *See id.*

109. Section 63 of the Sex Discrimination Ordinance establishes the Equal Opportunities Commission. Sex Discrimination Ordinance, Cap. 480 § 63 (1997).

110. Conciliation is a type of mediation between the parties. The EOC acts as the mediator and attempts to get the parties to agree to a settlement. *See id.* § 64(1)(d).

111. *Id.* § 77.

112. *Id.* § 65.

113. The survey was taken from a random sample of 2,020 Hong Kong Chinese people. *Id.* Among the 2,020 respondents, 48.3% were male and 51.5% were female. *Id.* "The socio-demographic characteristics of the respondents largely coincide with the general population as reported by the 1996 Hong Kong by-census." Equal Opportunities Commission, *A Baseline Survey of Equal Opportunities on the Basis of Gender: Executive Summary*, *available at* http://www.eoc.org.hk/ep/ep.html (last visited Nov. 8, 2000).

114. The objectives of the survey were to:

> collect information about the public's perception of gender role and stereotyping . . . collect information on the public's perception and experience of equality or discrimination between men and women in the media, family, education, work, and community participation . . . establish baseline subjective indicators reflecting equal opportunities or discrimination on the basis of gender . . . [and] collect information about the public's knowledge of the establishment of the Equal Opportunities Commission.

Id.

men,[115] that the traditional gender-based division of household chores survives,[116] and that sex discrimination in employment is more commonly perceived by women than men.[117] In sum, about 52.5% of the respondents perceived gender discrimination as a common occurrence, and most respondents perceived discrimination as most commonly occurring in work-related situations.[118]

In response to the Baseline Survey and pursuant to Section 69 of the Sex Discrimination Ordinance,[119] the EOC released the code of practice for employer compliance with the Sex Discrimination Ordinance in December 1996. The code "aims to eliminate discrimination on the grounds of sex, marital status and pregnancy, sexual harassment and victimisation[120] in

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115. Respondents considered the print media as discriminating more against women than the television media. *See id.* "About 66% of the respondents agree[d] that the government should legislate to curb discrimination against women in the media, with more men than women supporting such government control." *Id.*

116. Most household chores and responsibilities are still primarily the wives' responsibilities. *See id.* The husbands' main responsibility is maintaining and repairing household appliances. It is uncommon for husbands to share housework or responsibilities with their wives. *See id.*

117. "Dismissal due to pregnancy, sexual harassment, and gender-based differential benefits are considered the most severe forms of gender discrimination." *Id.* "Employed women are more sensitive than employed men in perceiving gender discrimination in employment situations." *Id.* "[M]ore women than men regarded the employment situations given in the Survey as gender-based discrimination especially when women have a greater chance of being laid off and senior positions are occupied by men." *Id.*

118. *See id.* However, "[o]lder respondents are generally less sensitive to gender inequality, tend to have gender-based family role expectation, perceive less gender discrimination at work, and think gender discrimination is infrequent in Hong Kong." *Id.*

119. Section 69 provides that "[t]he Commission may issue codes of practice containing such practical guidance as it thinks fit for the purposes of (a) the elimination of discrimination; (b) the promotion of equality of opportunity between men and women generally; and (c) the elimination of sexual harassment." Sex Discrimination Ordinance, Cap. 480 § 69 (1997).

120. Victimization is defined by Section 9 of the Sex Discrimination Ordinance as follows:

> A person ('the discriminator') discriminates against another person ('the person victimised[sic]') in any circumstances relevant for the purposes of any provision of the Ordinance if he treats the person victimised less favourably [sic] than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised [sic] or any other person ('the third person') has (a) brought proceedings against the discriminator or any other person under this Ordinance; (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Ordinance; (c) otherwise done anything under or by reference to this Ordinance in relation to the discriminator or any other person; or (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Ordinance, or by reason that the discriminator knows the person victimised or the third person, as the case may be, intends to do any of those things, or suspects the person victimised or the third person, as the case may be, has done, or intends to do, any of them.

employment and to promote equal employment opportunities between men and women."[121] The code was designed to "help employees, their colleagues, employers and other concerned parties to understand their responsibilities under the [Sex Discrimination Ordinance]. The code also provides guidance on the procedures and systems that can help to prevent discrimination and to deal with unlawful acts in employment."[122] The code recommends that employers use consistent selection criteria for recruitment, promotion, transfer, training, and dismissal as well as in the terms and conditions of employment.[123] Employers are encouraged not to take the code lightly. For example, Section 69 of the Sex Discrimination Ordinance states, in part, that:

> A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Ordinance before any court any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.[124]

A particular area of interest in the code is the elimination of gender-based job advertisements.[125] The code suggests that employers "avoid requests for photographs and copies of identification at the application stage," place a statement such as "equally open to men and women" when advertising for an open position, advertise in publications with distribution to both sexes,[126] and review all advertising materials and accompanying literature to ensure that women are not pigeonholed into their traditionally limited professional roles.[127]

Another area of interest in the code is the concept of equal pay for equal work. The code defines "like work" as work that is "of a broadly similar nature and where the differences between the tasks performed by either the man or the woman are not of practical importance to the terms and conditions of employment."[128] The code cautions that different job titles, job

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Sex Discrimination Ordinance, Cap. 480 § 9 (1997).

121. Equal Opportunities Commission, Code of Practice, *available at* http://www.eoc.org.hk/ep/ep.html (last visited Nov. 8, 2000).

122. *Id.* § 1.2.

123. *See id.* § 10.2.

124. Sex Discrimination Ordinance, Cap. 480 § 69 (1997).

125. *See* Equal Opportunities Commission, Code of Practice § 11.5, *available at* http://www.eoc.org.hk/ep/ep.html.

126. The publications should include only those that are sent to both sexes – not those that are predominantly read by either sex. *See id.* § 11.5.8.

127. *See id.* § 11.5.2.

128. *Id.* § 12.2.

descriptions, or contractual obligations, do not necessarily imply the work is different.[129] With regard to sexual harassment, the code provides a list of behaviors that could constitute sexual harassment.[130] The code also specifies that one incident of harassment may constitute sexual harassment.[131] In an effort to legitimize the Sex Discrimination Ordinance, the EOC brought or assisted in several lawsuits alleging violations of the Ordinance.

IV. THE STATUS OF HONG KONG WOMEN SINCE JULY 1997

A. Application of the Sex Discrimination Ordinance by the Courts

1. Equal Opportunities Commission v. Apple Daily LTD

In *Equal Opportunities Commission v. Apple Daily LTD,*[132] Apple Daily LTD ("Apple Daily") published an advertisement in Chinese on May 9, 1997. According to the English version of the advertisement, the ad read "Celebrities - Fashion page requires a number of beautiful female reporters to report on balls and parties . . . ."[133] In response, the EOC alleged that Apple Daily violated Section 43(1) [134] of the Sex Discrimination Ordinance and filed a Complaint with the Hong Kong court. The trial court determined that the advertisement was capable of two different interpretations and thus dismissed the application.[135] The court of appeals disagreed and reversed the trial court.[136]

The court of appeals found that the words in Section 43(1) had a plain meaning and were simple to apply.[137] The court held that "[o]nce it is established that an advertisement indicates, or might reasonably be understood as indicating that intention, it seems to [this Judge] that it matters not that the advertisement indicates, or might reasonably be understood as indicating also some other intention to do an act which is not unlawful."[138] The court

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129. *See id.* § 12.3.

130. Behavior such as unwelcome sexual advances; unwelcome requests for sexual favors; unwelcome verbal, non-verbal, or physical conduct of a sexual nature; and conduct of a sexual nature that creates a hostile work environment are examples of sexual harassment according to the code. However, the code explicitly states that the list is not exhaustive. *See id.* § 6.1.

131. *See id.* § 6.3

132. EOC v. Apple Daily LTD, 1998 HKC LEXIS 1782 (1998).

133. *Id.* at 4.

134. Section 43(1) states: "It is unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do any act which is or might be unlawful by virtue of Part III or IV." Sex Discrimination Ordinance, Cap. 480 § 43(1) (1997).

135. Apple Daily LTD, 1998 HKC LEXIS at 2.

136. *Id.*

137. *See id.* at 14.

138. *Id.* at 15.

reasoned that if an alternative meaning is to be taken as an indication of a contrary meaning then it would "certainly severely limit" the effect of Section 43(1) of the Ordinance.[139] In holding that the trial court's application of Section 43(1) would "militate against the purpose of the Ordinance,"[140] the court doubted that the Legislative Council intended to construe Section 43(1) using the trial court's reasoning.[141] Most importantly, the court of appeals cited a compelling public policy argument to support its finding, in that, "Apple Daily's construction [of Section 43(1)] would enable employers who intended to recruit employees of only one gender where that was not permitted by the Ordinance, to advertise freely for employees of that gender by simply including an ambiguity in that respect."[142]

Finally, the court of appeals held that the trial court erred by assuming that a reasonable understanding as required by Section 43(1) must be the sole meaning.[143] The court remanded the issue of a financial penalty to the trial court.[144]

2. *Yuen Sha Sha v. Tse Chi Pan*

In *Yuen Sha Sha v. Tse Chi Pan*,[145] the plaintiff and defendant were students of the Chinese University in Hong Kong. On several occasions from October 1996 to March 1997, the defendant covertly placed a camcorder on the plaintiff's roommate's dresser in an effort to film the plaintiff undressing. The plaintiff neither consented to nor had knowledge of the existence of the camcorder in her bedroom. The camcorder recorded images of the plaintiff getting ready for bed, sleeping, and undressing. On occasion, the plaintiff

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139. *Id.*

140. *Id.*

141. The trial judge found an ambiguity in the advertisement. *See id.* at 7-8. Respondents contended that the English translation certified by the court was not the only translation. *See id.* at 14. They claimed the other interpretation was "reporters are required for interviews of pretty females at balls." *Id.* at 7. Therefore, the trial judge, applying the ordinary reasonable man or woman test held that "readers of the Celebrities Fashion page of the Apple Daily are capable of reading both meanings from the wording of the advertisement." *Id.* at 11. Thus, the court concluded that "the advertisement as read by the ordinary reasonable man or woman [did not bear] only the meaning interpreted by the applicant" and therefore the case was dismissed. *Id.* at 7.

142. *Id.* at 16.

143. *Id.* at 19.

144. *See id.* The EOC sought a $1,000 penalty against Apple Daily. *Id.* at 20. The EOC urged the court to impose a financial penalty or "the Commission might not be disposed to pursue the matter before the District Court, being concerned primarily to clarify the meaning of Section 43(1)." *Id.* The court held that no submissions had been made as to the quantum of financial penalty and thus declined to impose a penalty. *Id.*

145. Yuen Sha Sha v. Tse Chi Pan, 1999 HKC LEXIS 6 (1999). This case was the first of its kind regarding sexual harassment in Hong Kong and the application of the Sex Discrimination Ordinance in that context.

was completely naked in her room. When the plaintiff accidentally discovered the camcorder, she began trembling and crying. She also felt scared, embarrassed, and violated. After she confronted the defendant, he admitted to filming her since October 1996. He also admitted showing the recording to a friend. The plaintiff then reported the matter to the hostel[146] warden, and the Hong Kong police were summoned.

After discovering the camcorder, the plaintiff was afraid to stay in her hostel room, unable to fall asleep alone, and unable to attend class for several weeks. As a result of the incident, the plaintiff became depressed and lost sixty-one pounds.

The plaintiff brought this action pursuant to Section 39(4) of the Sex Discrimination Ordinance,[147] alleging sexual harassment in an educational establishment and under Section 76(3A) of the Ordinance,[148] which lists the remedies available when the court finds a violation of the Ordinance. The court quickly found that "[c]learly, the defendant's video taping of the plaintiff without her consent dressing and undressing is sexual in nature and is undeniably unwelcome."[149] Therefore, the court held that the defendant committed an act of sexual harassment which violated Section 39(4) of the Sex Discrimination Ordinance.[150] The court then proceeded to examine the issue of damages.

First, the court discussed the issue of "injury to feelings."[151] The defendant contended that his unreserved apology in open court and admission

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146. A hostel is a dormitory.

147. Section 39(4) states: "It is unlawful for a person who is seeking to be, or who is, a student of an educational establishment to sexually harass a woman– (a) who is, or is a member of, the responsible body for; or (b) who is a member of the staff of the establishment." Sex Discrimination Ordinance, Cap. 480 § 39(4) (1997).

148. Section 76(3A) states:

> Without limiting the generality of the power conferred by subsection (3), the District Court may (a) make a declaration that the respondent has engaged in conduct, or committed an act, that is unlawful under this Ordinance, and order that the respondent shall not repeat or continue such unlawful conduct or act; (b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant; . . .(e) order that the respondent pay to the claimant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct or act; (f) order that the respondent shall pay to the claimant punitive or exemplary damages . . . .

Sex Discrimination Ordinance, Cap. 480 Section 76(3A) (1997). Section 76(6) states: "For the avoidance of doubt, it is hereby declared that damages in respect of an unlawful act of discrimination or sexual harassment may include compensation for injury to feelings whether or not they include compensation under any other head." Sex Discrimination Ordinance, Cap. 480 Section 76(6) (1997).

149. Yuen Sha Sha, 1999 HKC LEXIS at 20.

150. *Id.*

151. Damages for injury to feelings are expressly allowed by Section 76(6) of the Sex Discrimination Ordinance. Sex Discrimination Ordinance, Cap. 480 § 76(6).

of liability "substantially mitigated" any damages for injury to feelings.[152] However, the court rejected the defendant's argument by taking into account five principles regarding damages,[153] the plaintiff's shock and dismay, and the humiliation and betrayal she felt upon discovery of the camcorder. The court awarded her $50,000 for injury to feelings.[154]

Next, the court analyzed exemplary damages, otherwise known as punitive damages.[155] Section 76(3A)(f) of the Sex Discrimination Ordinance authorizes the court to award punitive or exemplary damages. The court found that the defendant's actions[156] justified an award of punitive damages in the amount of $20,000.[157] The court held that "the conduct of the defendant in this action and the [late] apology [were] offered not out of remorse but to avoid the award of huge damages."[158] After examining case law and legal treatises,[159] the court also held that the relative "means of the plaintiff [was] 'not of real' relevance to an award of exemplary damages."[160] Therefore, it was irrelevant that the defendant was expelled from school and working part-time and that the plaintiff was working as a full-time teacher.

In addition, the court awarded the plaintiff $10,000 in aggravated damages.[161] The court found that the defendant "deliberately added insult to injury" and was "defiant, unrepentant and vindictive."[162] Additionally, the court observed that the defendant's behavior was "tantamount to flouting the legislation . . . reprehensible, and should not be condoned."[163] Under Section 76(3A)(b), the court ordered the defendant to render a written apology to the

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152. Yuen Sha Sha, 1999 HKC LEXIS at 20.

153. The court gleaned the five principles by summarizing the cases of Prison Services & Ors v. Johnson, ICR 275 (Employment Appeal Tribunal, 1997) and Alexander v. Home Office, ICR 685 (1988) from the English Court of Appeals. The five principles are: (1) "Awards for injury to feelings are compensatory;" (2) "Awards should not be too low, as that would diminish respect or the policy of anti-discrimination legislation;" (3) "Awards should bear some broad general similarity to the range of awards in personal injury cases;" (4) When assessing a sum, tribunals should keep in mind the value the sum has in everyday life; and (5) Tribunals should bear in mind the need for public respect for the level of awards made. *Id.* at 21-22.

154. The court also considered it "necessary and appropriate" to look at damages awarded in other jurisdictions. *Id.* at 23.

155. The reasoning behind the award of punitive damages is to punish the defendant for his conduct in inflicting harm. *See id.* at 25.

156. The defendant carefully measured the angle and distance of the lens in directing it toward the plaintiff's wardrobe; he showed the tape to his friend; he failed to apologize; falsely declared his love in an attempt to get himself "off the hook"; and he attempted to put pressure on the plaintiff by having a former schoolmate contact plaintiff and threaten a civil action for nuisance. *See id.* at 29-30.

157. *Id.* at 36.

158. *Id.* at 30.

159. *See id.* at 30-35.

160. *Id.* at 34.

161. *Id.* at 36.

162. *Id.*

163. *Id.*

plaintiff.[164] Moreover, the court awarded the plaintiff costs under the local rules of civil procedure that provide for special circumstances that warrant such an award.[165]

3. *Chan Wah v. Hang Hau Rural Committee & Anor*

In *Chan Wah v. Hang Hau Rural Committee & Anor*,[166] the plaintiff applied to the Sai Kung District Office to register as a voter in the election of the Po Toi O village representative. The plaintiff applicant was not an indigenous villager, but he was married to one. However, his name was excluded from the final list of eligible voters. Among other alleged violations, the applicant claimed that he was subjected to unlawful discrimination prohibited by the Sex Discrimination Ordinance because a non-indigenous villager woman married to an indigenous villager man might vote in an election of a village representative, while a non-indigenous villager man married to an indigenous villager woman may not.[167]

The court held that disenfranchising the applicant was "clear discrimination on the grounds of the man's sex, and [was] unlawful."[168] For lack of a better argument, the defendant asserted that the Sex Discrimination Ordinance was incompatible with the guarantees contained in Article 40 of the Basic Law.[169] The court stated that "[t]here is nothing before [this court] to show that one of the 'lawful traditional rights and interests of the indigenous inhabitants' is the right to discriminate against a man on the ground of his sex."[170] Therefore, the court concluded that "the applicant [had] established an invasion of his civil rights, and he [was] entitled to a remedy."[171]

4. *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*

The appellant in *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*[172] brought claims under the Sex Discrimination Ordinance against three respondents. She alleged that the first respondent failed in its management duties by allowing or failing to forbid bare-chested men from

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164. *See id.* at 37.

165. *See id.*

166. Chan Wah v. Hang Hau Rural Committee & Anor, 1999-2 HKC LEXIS 160 (1999).

167. *See id.* at 6.

168. *Id.*

169. Article 40 of the Basic Law states: "The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region." The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 40 (July 1, 1997).

170. Chan Wah, 1999-2 HKC LEXIS at 7.

171. *Id.*

172. Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS, 1992-2 HKC LEXIS 747 (1999).

appearing on the sports field. The second respondent, a newspaper vendor, allegedly violated the statute when two bare-chested men appeared at the pedestrian path near the newspaper stand and insulted the appellant with foul language and words describing sexual acts. The appellant alleged that the third respondent, a vegetable stall owner, had allowed a bare-chested man to sell vegetables at the stall. On respondent's motion, the Registrar dismissed the appellant's actions. The appellant appealed the dismissal.

The appellate court held that the appellant had no "locus standi to commence proceedings for sexual harassment."[173] The court reasoned that the cited acts had occurred during the course of playing sports or engaging in manual labor.[174] Moreover, the acts were not sexual advances or conduct of a sexual nature and, further, they were not directed at the appellant.[175] In addition, the court found that the appellant failed to establish both the relationship between the respondents and the men[176] and the reasons why the respondents should be held responsible for the behavior of those men.[177] Therefore, the court held that no violation of the Sex Discrimination Ordinance had occurred.[178]

B. Analysis

The aforementioned court cases specifically analyze the amendments to the Sex Discrimination Ordinance made four days before Hong Kong's reversion to Chinese control.[179] The most important of these amendments repealed the $150,000 cap on damages originally contained in Section 76(7).[180] In addition, an amendment allowed the District Court to order reinstatement or promotion of a woman who was subjected to wrongful sex discrimination.[181] Moreover, an amendment to Section 76 allowed the

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173. *Id.* at 1. The court applied the following reasoning:

> It was not shown that the alleged act of sexual harassment occurred in the course of offering to provide or providing goods, facilities or services to the appellant. Further it was not shown that the appellant and the respondents had an employer-employee or other working relationship. They were not members or potential members of the same organisation or body. The respondents were not educational establishments, landlords, persons who managed or disposed of premises, barristers, barrister's clerks or persons giving instructions to a barrister. . . .

Id.

174. *See id.*

175. *See id.* at 2.

176. *See id.*

177. *See id.*

178. *Id.*

179. The amendments to the Sex Discrimination Ordinance became operative on June 26, 1997. Sex and Disability Discrimination Ordinance, Miscellaneous Provisions (1997).

180. Amendment 6(b) repealed Section 76(7-8). *Id.*

181. *See* Sex Discrimination Ordinance, Cap. 480 Section 76(3A)(c)-(d) (1997).

District Court to award punitive damages.[182]

In light of these changes, the court in *Yuen Sha Sha v. Tse Chi Pan* discussed at length the remedies available under the Ordinance. The *Yuen Sha Sha* case was the first of its kind in Hong Kong. Judge HC Wong quickly recognized a violation of the Sex Discrimination Ordinance and took the opportunity to discuss the damages available to the plaintiff. The court interpreted the Ordinance literally and ordered the defendant to pay a total of $80,000 in damages and tender the plaintiff a written apology. To provide adequate support for its damage award, the court utilized case law from Hong Kong, case law from other jurisdictions, and influential legal treatises on damage awards. Most importantly, the court used specific facts in the case to support its reasoning and damage award. Judge Wong's logical reasoning provides an excellent springboard for subsequent cases involving damages under the Sex Discrimination Ordinance.

The second sexual harassment case brought under the Sex Discrimination Ordinance, *Cheng Yin Fong v. Incorporated Owners of Siu on Court & ORS*, was dismissed. The court indicated that the facts of the case failed to establish sexual harassment under the Ordinance. Clearly, the court was sending a message that in order for business owners to be liable for sexual harassment there must be some connection between the business and the alleged offenders.

Additionally, the court found that "insulting a woman with foul language was impolite, ungentlemanly and rude, and might have caused the appellant to feel offended, insulted, or intimidated, [but] such behavior did not constitute a sexual advance or conduct of a sexual nature and thus was not sexual harassment."[183] This statement by the court is troubling, especially if it is applied in future cases. The EOC's Code of Practice specifically mentions that "one incident may be sufficient to constitute sexual harassment."[184] The Code also states that "unwelcome verbal, non-verbal or physical conduct of a sexual nature - e.g., sexually derogatory or stereotypical remarks . . ." can be regarded as sexual harassment.[185]

However, the context in which the statements were made to the appellant in *Fong* probably had a large influence on the court. Since the sexual comments were allegedly made by passers-by and not by employees of the newspaper stall, the court had difficulty finding sexual harassment. However unfortunate, women must regularly withstand sexually lewd remarks made by strangers. In those situations, women can walk away. Consequently, a hostile environment is arguably not created. Caution must be taken, however, when comments and statements of a sexual nature are

182. *See* Sex Discrimination Ordinance, Cap. 480 Section 76(3A)(f) (1997).

183. Cheng Yin Fong, 1999-2 HKC LEXIS 747 at 2.

184. Equal Opportunities Commission, Code of Practice § 6.3, *available at* http://www.eoc.org.hk/ep/ep.html.

185. *Id.* § 6.1.3.

made to a woman at work. Comments of the nature described in *Fong* could create a hostile work environment. It is important that the Hong Kong courts realize the distinction and do not take the *Fong* court's holding out of its factual context.

The first case heard by a Hong Kong court alleging a violation of the Sex Discrimination Ordinance was *Equal Opportunities Commission v. Apple Daily LTD.* The Hong Kong Court of Appeal overruled the District Court's dismissal of the case. The holding by the Court of Appeal was significant. Since the case was one of first impression, the EOC and leaders of the women's movement watched closely. The court discounted the trial judge's findings and interpreted the Sex Discrimination Ordinance by relying on legislative intent. The court was careful not to "militate against the purpose of the Ordinance."[186] Finally, the court in *Chan Wah v. Hang Hau Rural Committee & Anor* reaffirmed the notion that the Sex Discrimination Ordinance applies to both men and women. But, most importantly, the court held that sex discrimination is prohibited in rural elections.

In conclusion, Hong Kong courts held true to the language of the Sex Discrimination Ordinance. The courts attempted to apply the Ordinance according to the drafters' intent. The courts neither expanded nor limited the Ordinance's scope. However, the courts have not yet addressed the issue of sex discrimination or sexual harassment in an employment situation. Nevertheless, if past decisions accurately predict the future, women should expect the court to deliver a fair, unbiased, and well-supported opinion based on legislative intent. Hong Kong women should be encouraged by the court system's performance in interpreting the Sex Discrimination Ordinance.

C. *Effectiveness of the EOC*

Public awareness of the EOC has risen from 34.9% in late 1996 to 87% in 1999.[187] In addition, 74% of the public reported that they would seek the help of the EOC if they experienced discrimination.[188] Since June, 1999, the EOC has received twelve hundred complaints.[189] Additionally, settlement prior to court intervention has been successful – the conciliation success rate is 66%.[190] The EOC has successfully eliminated virtually all discriminatory advertisements from newspapers.[191] Moreover, the EOC's publication of the

186. Apple Daily LTD, 1998 HKC LEXIS at 15.

187. Equal Opportunities Commission News – Message from the Chairperson, *The First Three Years of the EOC, available at* http://www.eoc.org.hk/message/english/em9903.html (last visited Nov. 8, 2000)[hereinafter Message].

188. *Id.*

189. *Id.* Note that the number of complaints received includes complaints from individuals claiming a violation of the Disability Discrimination Ordinance as well as the Sex Discrimination Ordinance. *See id.*

190. *Id.*

191. *See id.* Thirty-seven percent of newspapers contained discriminatory advertisements

Code of Practice has lessened big business' resistance to the anti-discrimination laws.

Nevertheless, the EOC struggled to overcome misconceptions.[192] Many people ridiculed the concept of equality and doubted the effectiveness of the EOC.[193] Furthermore, there were high expectations that the EOC would "administer justice by prosecuting, punishing, and publicly condemning alleged offenders."[194] Critics questioned the role of conciliation and the potential threat of increased litigation it presented.[195] Most significantly, the EOC was perceived as a women's commission devoted to serving solely women's needs and concerns.[196]

Due to the misconceptions, the EOC has not escaped criticism. The EOC has been accused of "setting up hurdles and discouraging victims from lodging complaints and seeking justice. Investigators from the Commission were said to always encourage victims to list their terms of conciliation."[197] The EOC's emphasis on conciliation, although a laudable goal, at times can hurt the victim of discrimination. If EOC investigators encourage settlement before court intervention, the victim may be persuaded to take less than she deserves; consequently, the discriminator will evade full responsibility for his actions. Thus, conciliation practices may not provide a large enough deterrent to cease future discriminatory activity.

D. Barriers to Equality

1. Education

Although the EOC has been effective in combating some forms of discrimination, a clear pattern of "[g]ender segregation is found in the choice of subjects in both secondary schools and tertiary institutions."[198] Female students dominate in faculties of art, humanities and social sciences, and business; whereas, male students dominate in faculties of engineering and science.[199] "Studies in Hong Kong show that through formal and informal

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before the establishment of the EOC. *Id.*

192. *See id.*

193. *See id.*

194. *Id.*

195. *See id.*

196. *See id.*

197. *Hong Kong Human Rights Monitor, supra* note 72.

198. *Barriers to Equal Opportunities for Women in Hong Kong*, Background Paper for the 1997 Women Leaders' Network Meeting, *available at* http://www.eoc.org.hk/message/english/extram3e.html (last visited Nov. 8, 2000)[hereinafter Barriers].

199. *See id. See also The Need for Objective and Subjective Indicators in Gender Statistics*, Paper presented at the APEC Experts' Meeting on Gender, *available at* http://www.eoc.org.hk/message/english/extram2e.html (last visited Nov. 8, 2000)(finding the

channels, children learn explicit gender roles in schools and are streamed in school subjects along gender lines."[200] For example, traditional school practice excludes girls from design and technology classes and boys from domestic classes.[201] Girls often perceive technology as difficult; however, with exposure to technology at a young age, girls should lose this perception and compete equally with boys.[202]

2. *Pay Disparity*

Government statistics from 1994 suggest that the pay disparity between women and men is 69%.[203] There is a clear earnings differential between men and women in almost all sectors of employment.[204] The earnings gap is larger for those in higher income categories, for those over thirty-five, and for married women,[205] suggesting that family "responsibility arising from marriage and [child bearing] contributes to the unequal earnings between men and women."[206] This phenomenon is likely a result of the continued existence of traditional gender stereotyping of women in Hong Kong.[207] Under this stereotype, women are expected to stay home and raise the children, clean the house, and perform the other duties necessary to keep a household functioning.[208]

3. *Government Service*

Although there are a number of outstanding Hong Kong women in the public limelight, statistics demonstrate that women do not fare as well as people may think. For example, among the twenty-four principal officers/directors of the bureau of the HKSAR, only six are women.[209]

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male/female ratio in construction, civil, and structural engineering was 732 men to 100 women; the ratio in electrical and electronic engineering was 714 men to 100 women; the ratio in mechanical, marine, production and industrial engineering was 615 men to 100 women) [hereinafter *Need for Statistics*].

200. *Id.* at 3.

201. *See id.*

202. *See id.*

203. Cheung, *supra* note 55, at 384 (finding that the real wage for men per month is $6,810 compared to the real wage for women at $4,685).

204. *See* Message, *supra* note 187.

205. *See Need for Statistics*, *supra* note 199.

206. *Id.* at 2.

207. *See Barriers*, *supra* note 198. "Different surveys have continued to show that women take up the majority of household chores and the role [of] the caretaker in the family. Women's groups have pointed out that the inadequacies of childcare support have limited women's opportunity to participate in the labor force." *Id.*

208. *See id.*

209. *How do Women Fare in Hong Kong?*, *available at* http://www.eoc.org.hk/message/english/extram1e.html (last visited Nov. 8, 2000).

Among all levels of government, no more than 12% of counselors are women.[210] Women in the Executive Council constitute 26.7% of the total council.[211] The government should strive for equality in representation to set an example for private individuals and companies.

4. *Discrimination in the Workplace*

While the Sex Discrimination Ordinance outlawed discrimination based on a woman's sex, discrimination prevails in the workplace. Stereotypical assumptions and attitudes towards women remain common in the workplace and continue to affect employment decisions.[212] Women comprise only 23% of the senior managers and administrators.[213] Studies indicate that women managers refer to themselves as "competent, responsible, intelligent, and analytical" while men view women as "sensitive and intuitive" and as having good people skills.[214] In addition, sexual harassment in the workplace is an increasing problem.[215] Over half of the complaints received by the EOC alleging sex discrimination are reports of sexual harassment and pregnancy-related discrimination in the workplace.[216]

V. THE NEED FOR A HIGH-LEVEL CENTRAL GOVERNMENT MECHANISM FOR FORMULATION OF POLICIES REGARDING WOMEN

The EOC and women's groups continue to urge the government to establish a commission on women's affairs. Similar to Australia's Commonwealth Office on the Status of Women and Great Britain's Women's Unit, a women's commission is needed in Hong Kong to "implement and monitor Hong Kong's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)."[217]

A. *Australia's Commonwealth Office of the Status of Women*

An exceptional model supporting the request of Hong Kong's EOC chairwoman for a women's commission is Australia's Commonwealth Office

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210. *Id.*

211. *Id.*

212. *See Barriers, supra* note 198.

213. *How do Women Fare in Hong Kong?, supra* note 209.

214. *Barriers, supra* note 198.

215. *See How do Women Fare in Hong Kong?, supra* note 209.

216. *See id.*

217. In addition, the central mechanism should: deal with issues in relation to [CEDAW]; formulate policies on women; advise on the impact on women of all government policies; direct funding into areas based on these policies; address women's problems; compile gender statistics and analyses; and act as clearing house on training programs for women. *See EOC Calls for an Accountable Women's Commission, available at* http://www.eoc.org.hk/news/300500e.html (last visited Nov. 8, 2000).

of the Status of Women ("OSW"). OSW works behind the scenes in developing governmental policy by conducting research and creating discussion and debate on women in the public sphere.[218] The OSW is not involved with resolving complaints of discrimination or handling legal cases alleging discrimination.[219] In order to insure that women have diverse choices and aspirations, a strong policy framework that supports women is imperative. Thus, the role of the OSW is to guarantee that the strong policy framework exists.

In order to fulfill it's role, the OSW will "monitor and advise on the impact of government policies and programmes on women; and be forward-looking and investigate emerging issues and develop new approaches in areas where existing policies are not achieving the government's aims."[220] The OSW made a commitment to consult with national women's groups and women "to ensure the views and concerns of women underpin effective policy development and advice."[221] The OSW plans to focus on six key areas of women's policy.[222] The primary focus in 1999 was Australia's country report on CEDAW for submission to the United Nations in 2000.[223] Australia's report was completed and submitted in 2000.[224] The OSW worked hard to ensure that the report fully reflected achievements for women and was consistent with government policy.[225]

The OSW also plans to address several other women's concerns in the upcoming year.[226] Statistics from Australia indicate that the OSW has had some impact on improving the status of Australian women. The participation rate for working age women (ages 15-64) reached a record high of 66.1% in December 1999.[227] The women's unemployment rate as of December 1999

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218. *See* Commonwealth Office of the Status of Women, *Our Role, available at* http://www.dpmc.gov.au/osw/content/our_role.html (last modified Aug. 2000).

219. *See id.* Australia has a separate agency, the Affirmative Action Agency, which administers the Affirmative Action (Equal Employment Opportunity for Women) Act. *See id.*

220. Commonwealth Office of the Status of Women, *Workplan for 1999-2000, available at* http://www.dpmc.gov.au/osw/content/workplan.html (last modified Aug. 2000).

221. *Id.*

222. Those areas include: "income security. . .; workforce participation, including childcare and workplace relations; women in leadership; prevention of violence against women; the law as it effects women; and international, including the lead up to the UN special session on Beijing plus 5 and Australia's next country report." *Id.*

223. *Id.*

224. *See* Commonwealth Office of the Status of Women, *Implementation of the Beijing Platform for Action – Australian Government Response, available at* http://www.osw.dpmc.gov.au/content/beijing.htm (last modified Oct. 2000).

225. *See Workplan, supra* note 220.

226. *See id.* The site lists other examples of areas where the OSW plans to direct its focus. *See id.*

227. Commonwealth Office of the Status of Women, *Australian Women – March 1999, available at* http://www.dpmc.gov.au/content/resources/women_aus.html (last modified Oct. 2000).

was at its lowest rate in nine years.[228] For the twelve months ending in August 1999, women's average weekly earnings rose by 3.5% to $677, compared with an increase of 1.5% (approximately $796) for men.[229] All females' total earnings rose by 1.2% compared with a 0.7% increase for men.[230] In addition, the number of Australian women participating in higher education has increased and surpassed the number of males.[231] In 1998, 54.7% of university students were female.[232]

Not only are there more women in higher education, but there are also more women in leadership in both the public and private sectors. In June, 1999, the 48.3% of the Australian Government employees were women.[233] Most significantly, 36.4% of appointments to the Senior Executive Service between June 1998 and June 1999, were women - an increase from the previous year in which women represented only 36.4% of the Senior Executive appointments.[234] The rate of women's participation in the Commonwealth Parliament is 24.5% (55 of the 224 Parliament members are women), up from 21.4% in 1996 and 14% in 1995 - more than double the international average of 13%.[235] Moreover, over the first 6 months of the year 2000, more than 150 women have been appointed to senior positions on Commonwealth boards and bodies.[236] In the private sector, 10% of board members are women, representing an increase from 8.3% in 1999.[237]

B. United Kingdom's Women's Unit

The United Kingdom's Women's Unit mirrors the success of the OSW. The Women's Unit was established to "ensure that Government policies knit together properly to take account of the interests of women."[238] The Unit does not handle discrimination complaints[239] but works to ensure that the

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228. *Id.*

229. Commonwealth Office of the Status of Women, *Facts About Women, available at* http://www.osw.dpmc.gov.au/content/resources/facts.html (last modified Oct. 2000).

230. *Id.*

231. *See id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Commonwealth Office of the Status of Women, *Women's Voice Strengthened with 152 new appointments to Commonwealth Boards, available at* http://osw.dpmc.gov.au/content/resources/media/000914_01.htm (last modified Oct. 2000). As of June 30, 2000, women held 32.2% of positions on Commonwealth boards and bodies. *Id.* Of the 474 appointments made from January to June 2000, 32% were women. *Id.*

237. *Id.*

238. *Delivering for Women: Progress so far, available at* http://www.womens-unit.gov.uk/1998/delivering/fore.htm (last visited Nov. 8, 2000).

239. The United Kingdom's Equal Opportunity Commission handles discrimination complaints. *See id.*

"Government considers the impact of all policy proposals on women and monitors the effects of [those policies]."[240] The Unit is currently working on women's issues such as poverty, education, health, violence, and women in power and decision-making.[241]

In November, 1998, the Unit released the Policy Appraisal for Equal Treatment.[242] The Appraisal requires government departments to work to ensure that policy and its results are "fair, lawful and practical, and promote equal opportunities in [the] widest sense."[243] Thus, the departments must "consider the impact on those who have found the actions and attitudes of others placing obstacles in the way of equality of opportunity."[244] The Appraisal lists three necessary steps in the policy appraisal process.[245] In addition, the Appraisal suggests avenues for determining the potential impact of a proposal.[246] The Appraisal also lists the relevant laws and international treaties that a department is required or would be required to consult in order to determine the legality of a proposal.[247]

The Women's Unit was responsible for and drafted the Fourth Report of the United Kingdom of Great Britain and Northern Ireland on the United Nations Convention on the Elimination of all forms of Discrimination against Women.[248] The Unit cites statistics exemplifying the continuing improvement of the condition of women in the United Kingdom. For example, in 1996, women made up 44% of the labor force as opposed to only 38% in 1971.[249]

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240. Women's Unit, *Factsheet: Ministers of Women, available at* http://www.womens-unit.gov.uk/1998/factsheet/3mfw.htm (on file with the author). The 2000 factsheet is currently being added to the Women's Unit website. *See* Women's Unit, *available at* http://www.womens-unit.gov.uk/2000/factsheets.htm (last visited Nov. 4, 1999).

241. *See* Women's Unit, *Delivering for Women: Progress so far (Platform for action: strategic objectives), available at* http://www.womens-unit.gov.uk/1998/delivering/app1.htm (last visited Nov. 8, 2000).

242. *See* Women's Unit, *Policy Appraisal for Equal Treatment, available at* http://www.womens-unit.gov.uk/1999/equal.htm (last visited Nov. 8, 2000).

243. *Id.*

244. *Id.*

245. The three steps include: 1. "Check how your policy or programme will affect, either directly or indirectly, different groups of people. . .[;] 2. Identify whether there is any adverse differential impact on a particular group or groups and then decide whether it can be justified in policy terms even if it is legally permissible[; and] 3. Take action, if necessary." *Id.*

246. The Appraisal suggests making full use of research and statistics and, if necessary, commission new data, consult established interest groups and those who are likely to use your service, and carry out a differential impact assessment, based on this and any other relevant information. *See id.*

247. *See id.*

248. Fourth Report of the United Kingdom of Great Britain and Northern Ireland on the United Nations Convention on the Elimination of all forms of Discrimination against Women (January 1999), *available at* http://www.womens-unit.gov.uk (last visited Nov. 8, 2000).

249. Women's Unit, *Delivering for Women: Progress so far (Women – the facts), available at* http://www.womens-unit.gov.uk/1998/delivering/fact.htm. The updated 2000 factsheet is currently being added to the Women's Unit website. *See also* Women's Unit, *available at*

Additionally, in 1997, the average hourly earnings of full-time working women were 80% of men's earnings.[250] Women represent 32% of managers and administrators and 35% of health professionals.[251]

The Women's Unit also conducted a study researching women's attitudes in 1999. The study found that women are not a homogeneous group.[252] There are striking differences between generations of women in terms of employment, income, educational aspirations, and the perceptions of family responsibility.[253] In general, older women were concerned with issues relating to health, crime, and justice. In contrast, younger women felt that employment and education were most important.[254] Fortunately, and perhaps due to the work of the Women's Unit, the majority of teenage girls saw few barriers to opportunity based on gender.[255]

VI. CONCLUSION AND PROPOSAL

Women in Hong Kong need a commission, sponsored by the government, to promote the interests of women, to represent working women, and to advocate women's concerns in employment and non-employment situations. In order for Hong Kong to hold true to its commitment to the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW), a women's commission is essential. Both the Australian and British commissions were responsible for drafting the country report required under CEDAW. Moreover, as the statistics indicate, both of the commissions' efforts had a dramatic effect on the overall condition of women in their respective countries. Only a governmental commission focusing exclusively on women and their needs can adequately identify the needs of women in Hong Kong.

The EOC has neither the time nor the resources required to perform the functions needed to ensure gender equality in all aspects of life – from work to politics to home. The purpose of the EOC is to enforce the discrimination ordinances. With a maximum statutory limit of 16 commission members and a total of 1200 complaints filed last year alone, the EOC is ill equipped to assume additional responsibilities. The EOC has provided a Code of Practice for employers to ensure compliance with the Sex Discrimination Ordinance;

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http://www.womens-unit.gov.uk/2000/factsheets.htm (last visited Nov. 8, 2000).

250. *Id.*

251. *Id.*

252. *See* Women's Unit, *Listening to Women: Qualitive Research Summary* (1999), *available at* http://www.cabinet-office.gov.uk/womens-unit/1999/listening/index.htm (last visited Nov. 8, 2000).

253. *See id.*

254. *See id.*

255. *See id.*

however, their efforts are ineffective because there is a lack of government personnel to enforce the Ordinance.

Gaps remain in the quality of services and the policies required to promote women's status and development in Hong Kong. A women's commission could address some of these concerns, such as education, employment, violence against women, health, welfare, and security. Coordinating government policies and services for women is not part of the EOC's jurisdiction.

Former EOC chairwoman, Dr. Fanny Cheung, articulated the need for a women's commission in Hong Kong by stating:

> [I]n countries where there are organisations similar to the EOC in Hong Kong, like the United Kingdom and Australia, women's affairs are being handled by separate government commissions or ministries. Over 30 national government[s'] offices are addressing the needs of women, indicating the urgent need for a central mechanism in Hong Kong.[256]

In addition to the establishment of a women's commission, the Hong Kong government must also revise the Sex Discrimination Ordinance. First, the government needs to reevaluate the need for the small house policy exemption. The small house policy clearly infringes upon the rights of women in violation of the Hong Kong Bill of Rights.[257] However, it does not violate the Sex Discrimination Ordinance because the Ordinance contains an exception that reads: "Any discrimination between men and women arising from that policy of government - (a) known as the small house policy; and (b) pursuant to which benefits relating to the land in the New Territories are granted to indigenous villagers who are men" is exempt from the Ordinance.[258]

The Hong Kong government insists that it needs more time to study the small house policy and to determine what reforms, if any, should be made.[259] However, the government had enough time to study the policy. It is time for the government to admit that the policy inherently discriminates against women and to remove the exception from the Sex Discrimination Ordinance. If the government expects private individuals to comply with gender equality mandates, then the government should abide by its own rules.

Next, the government needs to eliminate the exceptions regarding qualifications for employment in governmental departments in the Ordinance.

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256. Press Release, Equal Opportunities Commission, Dr. Fanny Cheung met with CEDAW Committee Members (Jan. 29, 1999)(on file with author).

257. The small house policy is clearly government action and falls within the scope of the Bill of Rights.

258. Sex Discrimination Ordinance, Cap. 480 Sched. 5 (1997).

259. *See generally* Petersen, *supra* note 34.

Exception 1 to the Sex Discrimination Ordinance allows:

> Any discrimination between men and women seeking to hold, or holding, any relevant office as to requirements relating to height, uniform, weight or equipment . . . (c) so far as any such office or class of such office which falls within that part of the police force known as the Police Tactical Unit is reserved for men.[260]

The government should eliminate the exemption on height, uniform weight or equipment and replace it with an exemption stating that "only discrimination that is reasonably necessary under the circumstances of employment" is allowed.[261]

Then, due to high legal fees in Hong Kong and in order to encourage victims of discrimination to bring legitimate lawsuits, the government should advocate the addition of a provision awarding attorney's fees for a prevailing plaintiff. After all, but for the defendant's alleged discriminatory activity, the plaintiff would not have incurred attorney's fees. The Ordinance will have little or no effect if women cannot afford to take violators to court and hold them responsible for their actions. A provision requiring the defendant to pay attorney's fees may also encourage early settlement. For example, a defendant faced with paying his attorney's fees, a judgment to the plaintiff, and the plaintiff's attorney's fees might agree to a quicker settlement to avoid paying the cost to litigate the matter in court where fees will dramatically increase. In addition, awarding attorney's fees under the Ordinance would make it easier for victims to obtain counsel since counsel will be assured of payment if their client prevails in court.

Finally, the Ordinance needs an additional provision outlawing unequal pay for equal work. The pay disparity between men and women in Hong Kong is a serious problem that continues to grow.[262] The Sex Discrimination Ordinance does not provide adequate protection against wage discrimination. "[T]he concept of unequal pay for similar or comparable work would likely fall outside the ambit of definitions of direct discrimination used in the Ordinance."[263] Because wage discrimination is incompatible with the notion

260. *Id.* at 258. "Relevant office" is defined by the ordinance as the police force, the royal Hong Kong Auxiliary police force, the immigration service, the fire services department, the correctional services department, and the customs and excise service. *See supra* note 258.

261. Petersen, *supra* note 34, at 379.

262. *See* Cheung, *supra* note 55, at 391.

263. *Id.*

of gender equality, the government should amend the Sex Discrimination Ordinance or enact new legislation that outlaws unequal pay for equal work.[264]

Allyson Singer[*]

264. *See id.* for a more thorough discussion on the disparity of wages between men and women in Hong Kong and the proposed solution.

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