

Resident of the Hong Kong Special Administrative Region	香港特別行政區居民
Revenue stamp	稅收印花
Seal	印章
Seditious publication	煽動刊物
Seditious words	煽動文字
Ship	船舶
Sister	姐妹
Specified information	指明的資料
Specified sexual offence	指明性罪行
Stamp	印花
Suspension order	暫停執行令
To destroy or damage any property	摧毀或損壞財產
Unlawful sexual intercourse	非法性交、非法的性交
Unmarked plastic explosive	無添加辨認劑的塑膠炸藥
Written publication	書刊

CRIMES ORDINANCE

(CAP 200)

Introduction

The Crimes Ordinance (Cap 200) draws together many facets of the criminal law. First enacted in 1972, the Crimes Ordinance consolidated provisions appearing in 11 Ordinances - involving crimes as diverse as piracy, forgery, perjury and sedition. The Attorney-General, Mr Denys Roberts, as he then was, introduced the bill to the Legislative Council by saying the object was to consolidate into readily accessible form 20 old English Acts of Parliament enacted prior to 1843 which were already part of the law of Hong Kong by virtue of the Application of English Law Ordinance (Cap 88). Three other Ordinances, the Incitement to Disaffection Ordinance, the Suppression of Fictitious Ordinance and the Treasonable Offences Ordinance which closely followed English legislation were also included. No substantive changes were made, although various obsolete or unnecessary provisions were deleted and some older phraseology was modernised. Over subsequent years, the Ordinance has consolidated offences as varied as vice offences, perjury, false documentation and sexual offences.

Criminal damage to property

Part VIII, which deals with criminal damage, was added by the Crimes (Amendment) Ordinance 1972. It was based on the English Criminal Damage Act 1971 which in turn was enacted as a result of reports by the English Criminal Law Revision Committee and the English Law Commission. Both reports described the previous English law on the subject that was substantially in force in Hong Kong as having many unsatisfactory features. The amending Ordinance repealed the Hong Kong Malicious Damage Ordinance and other provisions which sometimes classified offences of damage to property by the type of property damaged and sometimes by the means employed to damage it and sometimes by both these tests. Part VIII was designed to simplify and rationalise the unnecessarily complex subject and substitute simpler provisions giving a wide latitude in the matter of sentence. The essence of the new offence of criminal damage was the destruction of, or damage to, the property of another without lawful excuse. Distinctions based on the nature of the property, its situation, the means used to destroy it or the circumstances in which it was destroyed were no longer to affect the nature of the offence, although they could be considered when assessing sentence. The powers of the various levels of courts to order compensation to be paid by offenders were also rationalised.

Prostitution and sexual exploitation of children

In 1990 amendments were brought in to improve control of nuisances

associated with vice establishments. They included new criminal sanctions to provide for the removal of signboards advertising the services of prostitutes (ss 147A-147F) and for a scheme to close premises or forfeit vessels where vice-related offences had repeatedly taken place (ss 153A-153O). These reforms came about as a result of recommendations made by a Fight Crime Committee working group.

By virtue of the prevention of Child Pornography Ordinance 2003 (31 of 2003), several additions and amendments were introduced to Cap 200. For example, the new s 138A makes it an offence to use, procure or offer persons under 18 for making pornography or for live pornographic performances. Sections 159P-159R are concerned with the extra-territorial effect (and related arrangements and advertisements) of certain sexual offences committed against children listed in Schedule 2 - itself a schedule newly added to this Ordinance.

Sexual offences and homosexuality

Homosexuality was decriminalised in 1991 after several years of controversy and discussion. Several sections ss 118A-118O, sought to extend to men and boys most of the provisions designed to protect women and girls from sexual exploitation. The reforms introduced the phrase 'unlawful sexual act' (replacing 'unlawful sexual intercourse') to include both unlawful sexual intercourse and homosexual acts. The amended Ordinance extended to men and boys the protection previously offered only to women and girls in relation to prostitution, by deleting reference to the sex of the prostitute or person living on the earnings of prostitution. A new provision abolishing the presumption that a boy under 14 was incapable of sexual intercourse was introduced as s 118O in 2012.

The constitutionality of various offences against homosexual buggery and gross indecency (ss 118, 118F(2)(a), 118H, 118J(2)(a)) was the subject of judicial review in *Leung TC William Roy v Secretary of Justice* [2005] 3 HKC 77, (CFI), [2006] HKLRD 211, (CA). The challenge was made on the grounds that the sections infringed the rights to privacy and equality of homosexual men. Whilst conceding that ss 118F(2)(a), 118H and 118J(2)(a) were unconstitutional, the government sought to justify the validity of s 118C (buggery between homosexual men when either one of them is under 21) - both in the Court of First Instance and subsequently in the Court of Appeal after Hartmann J decided in favour of the applicant. The court was of the view that s 118C was discriminatory in that it significantly affected homosexual men in an adverse way compared with heterosexuals. The court also found that the government failed to discharge the burden of justifying the infringement of privacy and equality.

The Court of First Instance declared that ss 118C and 118H, to the extent that they apply to a man aged 16 or over and under 21, are inconsistent with Article 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights and were unconstitutional. It also declared that ss 118F(2)(a) and 118J(2)(a) were inconsistent with Article 25 and 39 of the Basic Law and Articles 1, 14 and 22 of the Bill of Rights and were

unconstitutional. The Court of First Instance's decision was upheld by the Court of Appeal and the government did not appeal further.

In another case, *Secretary for Justice v Yau Yuk Lung Zigo* [2007] 3 HKC 545, (CFA), s 118F as a whole was the subject of a constitutional challenge. The section was held to be discriminatory as it criminalised homosexual buggery between men committed otherwise than in private, whereas no comparable offence existed for heterosexuals. The court found no justification or relevant moral consideration which could support the targeting of homosexual activities otherwise than in private.

No changes have yet to be introduced by the government in relation to the above sections. The Law Reform Commission of Hong Kong formed a 'Review of Sexual Offences Sub-committee' in June 2006, which is expected to propose a range of legislative reforms on sexual offences in Hong Kong. Note that in the United Kingdom, the 2003 c 42 came into force on May 1, 2004. The new Act re-defines some offences (e.g. rape), creates a range of new offences (e.g. assault by penetration and voyeurism) and makes express provision in relation to the key issue of consent. It repeals all but a few provisions in the previous Sexual Offences Acts of 1956 and 1967, on which certain sexual offences provisions in Part XII of this Ordinance were modelled.

Abolition of the death penalty

In November 1992, responding to the majority view in a 1991 motion debate by Legislative Councillors, the administration introduced the Crimes (Amendment) (No 3) Bill 1992, proposing the abolition of the mandatory death penalty, replacing it with mandatory life imprisonment, not only for murder but also for treason and piracy with violence. A Bills Committee was set up to study the bill and after receiving different views from various interested organizations, it took the view that murder stood in a different category from treason and piracy with violence. It concluded that mandatory capital punishment should be substituted by a mandatory life sentence for murder but by a discretionary life sentence for treason and for piracy with violence. It also felt strongly that legislation should be enacted to put the Board of Review of Long Term Prison Sentences on a statutory basis. This Board of Review provided individual scrutiny of cases on reviews of life sentences and certain other categories and subsequently in June 1997 the Long Term Prison Sentences Review Ordinance (Cap 524) was passed.

During the legislative debate on the Crimes (Amendment) (No 3) Bill 1992, views were again expressed both for and against the abolition of mandatory capital punishment and its substitution by the mandatory life sentence. One member, Mr Simon Ip, spoke in favour of a discretionary life sentence on the ground that a mandatory sentence was unsatisfactory as it would cover convicted persons of different degrees of culpability and would also blur the separation of powers. At the end of the debate, the administration accepted the views of the Bills Committee and gave an assurance that the legislation it required would be introduced and in April 1993, the Crimes (Amendment) Ordinance was passed (with 40 votes in favour, 9 votes against and 2

abstentions). It prescribes mandatory life imprisonment only for murder. A discretionary life sentence is prescribed for treason and for piracy with violence.

Young people under 18 years of age are now subject like adults to the mandatory life sentence for murder, unlike previously when they were subject to mandatory detention during Her Majesty's pleasure instead of the mandatory death penalty for adults. However, under s 2 of the Offences Against the Person Ordinance (Cap 212) if it appears to the court that a person convicted of murder was under 18 years of age at the time of the offence, the court has a discretion as to whether the person should be sentenced to imprisonment for life or to imprisonment for a shorter term. In 2004, the Criminal Procedure (Amendment) Ordinance 2004 was enacted to require a court to impose a minimum term of imprisonment where the young person is sentenced to life imprisonment or detained at Executive discretion.

Forgery and counterfeiting

The law relating to forgery and counterfeiting of bank notes and coins was modernised and simplified in 1992 when Part IX of Cap 200 was replaced. The new Part was substantially modelled on the English Forgery and Counterfeiting Act 1981. Under the amending Ordinance, a large number of offences carrying different maximum penalties depending on the nature of the document forged were replaced by three basic forms of criminal conduct - making a false instrument, making a copy of a false instrument and using a false instrument. A new statutory offence of forgery replaced the common law offence which had fallen into disuse and was worded so as to include cheques and letters of credit and also modern forms of information technology. Part IX also brought together the various provisions on counterfeiting currency notes and coins into a single offence. Penalties were also rationalised.

Loitering

The controversial law on loitering was also amended in 1992 to bring it in line with the Hong Kong Bill of Rights Ordinance (Cap 383). Previously s 160 empowered police officers to require an accused person to explain suspicious behaviour if he was found loitering in a public place or in the common parts of any building. That requirement risked infringing the presumption of innocence guaranteed by Article 11(1) of the Bill of Rights and the right of an accused person not to be compelled to confess guilt. Previously a majority of the Law Reform Commission in 1990 had also found the law unacceptable. In fact it recommended, by a majority, that s 160(1) be repealed and not substituted, declining to follow the recommendation of its sub-committee which reported on the topic. The Law Reform Commission felt that even if the subsection were amended, the objections to it outweighed its usefulness as a law against loitering was wrong in principle and the subsection was open to abuse. The issue was also hotly debated in the Legislative Council where a proposal that subs (1) be abolished was defeated. It was felt by a majority of Legislative Councillors that the offence was an effective means of crime prevention and there was a need to retain it. Eventually the subsection was

amended by limiting the scope of the offence to conduct that reasonably suggested the purpose of committing an offence for which the sentence was fixed in law. Any failure by the suspect to give a satisfactory explanation of his presence and behaviour would now only form part of the evidence in the case, and it no longer constitutes a part of the offence. Also, the amendment required the prosecution to prove intention on the part of the accused to commit an arrestable offence.

Plastic explosives

Further amendments were made in 1994 when Part VIIA dealing with unmarked plastic explosives was added to the Ordinance. The Ordinance already contained severe penalties for making explosives or possessing them with the intention of harming life or property and this new Part was designed to complement those provisions in relation to a particularly dangerous class of explosives. Part VIIA implements measures set out in the Montreal Convention on the marking of plastic explosives for detection purposes in the fight against terrorism. Plastic explosives are difficult to detect by conventional means, as they are manufactured in the form of a malleable gel, which makes them easy to transport and conceal. However they have great destructive power, making them an attractive weapon to terrorists, particularly for an attack on aircraft. The amendment, which closely followed the Montreal Convention, proscribes the import of unmarked plastic explosives into the territory and makes it an offence to export, possess or transfer, for all but a few clearly defined purposes, unmarked plastic explosives. Further, it removes the requirement to prove intention to harm life or property in respect of plastic explosives.

Inchoate offences

The introduction of a statutory offence of conspiracy to defraud in July 1996 followed a report by the Law Reform Commission. Some two years earlier, the Law Reform Commission had made recommendations on the codification of the preliminary offences of incitement, conspiracy and attempt. It was suggested that Hong Kong follow England's lead of adopting a mini-code for all three preliminary offences, incorporating provisions based on those in the English Criminal Law Act 1977 dealing with conspiracy, the English Criminal Attempts Act 1981 dealing with attempts and a report from the Law Commission on incitement. It was felt that codification would enhance accessibility in that it would no longer be necessary to consult a large number of cases to find out the law, and it would be more comprehensible and more certain in its operation. Importantly the LRC recommended that the defence of impossibility should be removed in relation to all three offences and that the common law offences of conspiracy to corrupt public morals and outrage public decency should be abolished on the grounds that they were 'of extreme and uncertain width', and were 'largely subjective and could evolve into means of suppressing unpopular or religious beliefs'.

The changes were brought in in 1996, under the amendments that form a new Part XIII. A statutory definition in s 159A (1) spells out the elements

constituting an offence of conspiracy (an agreement between two or more people to do an act amounting to or involving an offence.) An attempt is defined in s 159G (1) as an act which is more than merely preparatory to the commission of an offence, giving flexibility so it can cover two types of cases (a) where a person has taken all steps he believes to be necessary towards the commission of a crime and (b) where a person has taken some further step to complete his crime, assuming he had the necessary mental element to commit it.

In the end the introduction of reforms on incitement was delayed by the Government until England brought in substantive legislation.

National security offences

Prior to the handover in 1997, the Legislative Council passed the Crimes (Amendment) (No 2) Ordinance 1997 (89 of 1997), which sought to repeal most and modify some of the laws on treason and sedition found in Part II of this Ordinance. Yet the relevant changes were never brought into force. More recently and controversially, in September 2002, the government proposed changes to the laws on treason and sedition, currently found at ss 2-18 of this Ordinance. Article 23 of the Basic Law requires the Legislative Council to make laws against 'treason, sedition, secession, and subversion,' but opponents of the proposed changes said the laws already on the books in Hong Kong sufficiently fulfil the requirements of Article 23. The draft legislation then placed before the Legislative Council criminalised a broad range of offences grouped into these four categories, and gave the government new authority to prosecute 'theft of state secrets,' to outlaw political organizations with ties to foreign groups, and to outlaw organizations 'endangering national security'. The proposals sparked significant criticisms both locally and internationally and the government at one stage was prepared to make some concessions. But the revised National Security (Legislative Provisions) Bill still failed to attract broad support from the public and from most Legislative Council members. On 5 September 2003, the government announced its withdrawal of the Bill. So far, there have been no further attempts by the government to re-introduce legislative changes for the purposes of implementing Article 23.

Other changes

Amendments were made to s 32A and s 153N by virtue of the Evidence (Miscellaneous Amendments) Ordinance 2003 (23 of 2003) and the Merchant Shipping (Local Vessels and Miscellaneous Amendments) Ordinance 2005 (24 of 2005) respectively.

The Ordinance is divided into the following parts:

- Part I - Treason
- Part II - Other Offences Against the Crown
- Part III - Piracy and Other Offences at Sea
- Part IV - Intimidation
- Part V - Perjury
- Part VI - Incest

- Part VII - Explosive Substances
- Part VIIA - Unmarked Plastic Explosives
- Part VIII - Criminal Damage to Property
- Part IX - Forgery and Related Offences
- Part X - False Certification and Personation
- Part XI - Counterfeiting and Kindred Offences
- Part XII - Sexual and Related Offences
- Part XIII - Preliminary Offences
- Part XIII - Miscellaneous offences

The main provisions of the Ordinance are as follows:-

- Part I
 - offence of treason and assaults on the Crown (ss 2-5)
- Part II
 - offence of incitement to mutiny and disaffection (ss 6-7)
 - sedition offences (ss 9-10)
 - unlawful oaths (ss 15-17)
- Part III
 - piracy (ss 19-22)
 - application of criminal law to Hong Kong ships at sea (s 23B)
- Part IV
 - intimidation and assault (ss 24-25)
- Part V
 - perjury (ss 29-31)
 - making false statements (ss 32-37)
- Part VI
 - incest by men (s 47)
- Part VII
 - causing an explosion likely to endanger life or property (s 53)
 - making or possessing an explosive (s 55)
- Part VIIA
 - offences involving the manufacture and possession of unmarked plastic explosive (ss 58A-58D)
- Part VIII
 - criminal damage to property (s 60)
- Part IX
 - offence of forgery (s 71)
 - offences of copying and using a false instrument (ss 72-74)
- Part X
 - making a false entry in a bank book (s 85)
- Part XI

- offences of counterfeiting notes and coins and passing them (ss 98-99)
- offences of reproducing Hong Kong currency notes and imitation Hong Kong coins (ss 103-104)

Part XII

- offence of rape (s 118)
- offences of buggery (ss 118A-118G)
- gross indecency by a man (ss 118H-118K)
- offence of bestiality (s 118L)
- indecent assault (s 122)
- intercourse with underaged girls (ss 123-124)
- intercourse with mentally incapacitated person (s 125)
- abduction of unmarried girls under 18 (ss 126-127)
- causing prostitution (s 131)
- living on earnings of prostitution of others (s 137)
- keeping a vice establishment (s 139)
- use of premises for illicit sexual purposes (ss 140-145)
- prohibition of signs advertising prostitution (s 147A)
- closure of premises and forfeiture of vessel in respect of which certain offences committed (ss 153A-153D)
- reporting restrictions on publishing details of identity of complainant in rape or indecent assault offences (s 156)

Part XIII A

- offence of conspiracy (s 159A)
- attempting to commit an offence (s 159G)

Part XIII

- offence of loitering (s 160)
- access to computer with criminal or dishonest intent (s 161)

CHAPTER 200

CRIMES ORDINANCE

To consolidate certain penal enactments.
[19 November 1971]

(Originally 60 of 1971; 10 of 1865; 23 of 1913; 3 of 1916; 13 of 1920; 11 of 1922; 21 of 1922; 26 of 1935; 33 of 1935; 34 of 1935; 13 of 1938)

Note:

* This Ordinance consolidates, as at 31 December 1972, provisions which previously appeared in the following Ordinances-

- (1) Crimes Ordinance (Cap 200, 1971 Ed.)
- (2) Crimes (Amendment) Ordinance 1972 (No. 48 of 1972)
- (3) Coinage Offences Ordinance (Cap 204, 1964 Ed.)
- (4) Criminal Intimidation Ordinance (Cap 205, 1964 Ed.)
- (5) Explosive Substances Ordinance (Cap 206, 1966 Ed.)
- (6) False Personation Ordinance (Cap 207, 1964 Ed.)
- (7) Falsification of Documents Ordinance (Cap 208, 1964 Ed.)
- (8) Forgery Ordinance (Cap 209, 1964 Ed.)
- (9) Perjury Ordinance (Cap 214, 1970 Ed.)
- (10) Punishment of Incest Ordinance (Cap 216, 1964 Ed.)
- (11) Sedition Ordinance (Cap 217, 1970 Ed.)

ARRANGEMENT OF SECTIONS

- 1 Short title

PART I

TREASON

- 2 Treason
- 3 Treasonable offences
- 4 Limitations as to trial for treason, etc
- 5 Assaults on the Queen

PART II

OTHER OFFENCES AGAINST THE CROWN

- 6 Incitement to mutiny
- 7 Incitement to disaffection
- 8 Power to search and prevent offences under section 7
- 9 Seditious intention
- 10 Offences
- 11 Legal proceedings

CRIMINAL PROCEDURE ORDINANCE

(CAP 221)

Introduction

The Criminal Procedure Ordinance was first enacted in 1899. It was designed to consolidate and amend the laws relating to criminal procedure in the then Supreme Court (now the High Court). Prior to this date, the law relating to criminal procedure was scattered over a considerable number of other Ordinances. They were repealed by the new Cap 221. At the same time it was the aim of the new Ordinance to introduce any English enactments that were relevant to Hong Kong that had not reached the statute book. While many provisions were reproduced from earlier enactments or from English acts, some new sections were added drawn from the Offences (Procedure) Ordinance 1891 in British Guiana. Many amendments have followed to modernise and rationalise various aspects of criminal procedure, usually based on changes in English legislation.

Following the 1967 Star Ferry riots, most of the emergency legislation brought into force to deal with the disturbances was repealed. However, some provisions were felt to be useful and ss 122 and 123 of the present Ordinance resulted from this period when the administration of justice was gravely hampered by the behaviour of organised groups crowding the courts and seeking to intimidate magistrates and judges or using the proceedings as an opportunity for hostile and unruly demonstrations. Thus, members of the public can be excluded from a court by a judge or magistrate under s 122, although the press is still allowed to be present. Section 123 conferred on a court the statutory power to hold proceedings *in camera* if it considers it desirable and provides for the non-disclosure of the identity of witnesses in certain cases.

In 1971 such parts of the English Criminal Law Act 1967 and the Criminal Justice Act 1967 as were thought to be appropriate to the needs of Hong Kong were introduced in the Criminal Procedure (Amendment) Ordinance 1971 (5 of 1971). Section 24A was added, setting out when indictments shall be preferred, and ss 51 and 51A were brought in to provide for the taking of pleas from a person tried on indictment, in particular sanctioning the practice of the courts whereby an accused could plead not guilty to the offence charged in the indictment but guilty to another offence of which he might have been found guilty on that indictment. Section 51A enabled a judge to enter a verdict of not guilty without having to give the accused into the charge of a jury when the prosecution offered no evidence.

Sections 65A to 65D were also added by the same amending Ordinance. The changes brought in obliged a court to apply a subjective test in determining

the intent with a criminal act is committed, to replace the old objective test. Thus the court now has to decide whether the accused actually foresaw what flowed from his act.

Important procedural changes were made by ss 65B and 65C. Written statements were made admissible in evidence in the same way as oral evidence, provided certain criteria set out was followed. Sections 65B has led to the saving of much court time, as witnesses are no longer obliged to give oral evidence on matters of a formal nature. Section 65C has shortened proceedings by providing for the first time that admissions by accused persons were conclusive evidence of those facts. Section 65D prohibits the accused without leave of the court, from calling evidence of an alibi at his trial, without giving previous notice to the prosecution of his intention to do so.

This amending Ordinance also updated the law with regard to aiders, abettors and accessories and the concealing of offences by introducing Part V. The existing law was simplified and consolidated. The offence of knowingly assisting an offender found guilty of an arrestable offence was created. Section 94A removed doubt about the need for the prosecution to negative exceptions to or exemptions from a law in circumstances in which it would be a defence to establish such an exception or exemption.

Suspended sentences were also introduced in 1971 to give wider sentencing options to judges. As suspended sentences were seen as a controversial move, the provisions were to expire after three years as provided in s 109H so the Government could assess the success or otherwise of the new sentencing option. As a further safeguard, the Third Schedule was added, setting out various offences for which a suspended sentence could not be passed. Section 109H was repealed in 1976 and the power to suspend sentences continues to exist. Although largely based on English legislation, there were important differences. The Hong Kong legislature did not want to abolish short jail terms, as had been done in the UK, by legislating that sentences of less than six months' imprisonment must be suspended. Further, Hong Kong courts were given the power to impose conditions as they thought fit on the convicted person.

In 1972, amendments were made in relation to the criminal procedure to be followed in trials with regard to insanity verdicts, unfitness to plead and other related matters. The old verdict on an accused person who was insane at the time he committed the offence of guilty but insane, was replaced by a new verdict of not guilty by reason of insanity. The amending legislation closely followed the English Criminal Procedure (Insanity) Act 1964 and the Criminal Appeal Act 1968.

Several other small but important changes to the Ordinance were made in this year. One such amendment saw the prosecution for the first time given the important right to seek a review from the court of a sentence passed which it felt was wrong in principle, manifestly excessive or inadequate or not authorised by law. This followed public criticism of some sentences passed for serious and violent offences at a time when there had been a substantial

increase in crime. It was also felt that this would provide greater uniformity in sentencing. This was a departure from English law although other common law countries, such as Australia had a similar provision.

Supervision of certain young offenders for the 12 months after their release was provided for in 1980 when an amendment was made to the Ordinance adding ss 109AA-109AC. The object was to provide a flexible scheme to take account of individual circumstances of offenders to provide them with the support and advice they needed as part of the rehabilitation process.

In 1981 amendments were introduced to make better provision for securing the attendance of witnesses, the present ss 34-38A. It was felt that increasingly witnesses were failing to turn up for trials and the powers and penalties available to the courts were inadequate to deal with the problem. Again, the new provisions were based on English provisions that had been well tested.

Part IA added in 1994, for the first time provided a statutory right to bail. Previously people accused of criminal offences had no statutory right to bail and there were no statutory provisions regulating the courts' discretion to grant or refuse bail. The courts relied on common law principles when exercising their discretion as to whether to grant bail. This was considered unsatisfactory after the Hong Kong Bill of Rights Ordinance (Cap 383) enshrined that it would not be the general rule that persons awaiting trial should be detained in custody. The amending legislation therefore contains a positive presumption in favour of bail, underpinning the Bill of Rights, which also provides in Article 5 that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. The amending Ordinance created a formal right to bail and codified the existing practice. Bail can now only be refused where the court considers there are substantial grounds for believing that a person would fail to surrender to custody as appointed, or would commit an offence while on bail, or would interfere with a witness, or pervert or obstruct the course of justice. The amendments were not intended to detract from the power of the court to withhold bail in appropriate circumstances.

The amendments followed an in-depth report by the Law Reform Commission on the topic and were largely based on the English Bail Act 1976.

Also added in 1994 was s 60 which abolished the common law requirement for judges to give the jury a warning about convicting the accused on the uncorroborated evidence of an alleged accomplice and to identify evidence that might be corroborative. It was felt that the rule was complex, technical and inflexible and a fruitful source of appeals. There were also sometimes difficulties over who was an accomplice. The reform was part of the Government package to tackle organised and serious crime.

In 1995, Part IIIA of the Ordinance was added to provide special procedures for vulnerable witnesses. The reforms dealt with three classes of witnesses, children, mentally handicapped and those who feared for their safety if they

testified. It was felt that these vulnerable witnesses might feel intimidated by the court atmosphere, upset by the presence of the offender and dismayed at having to give an account of the facts, firstly to the police and then again to the court. An additional problem was caused by the rule that a defendant could not be convicted on the unsworn evidence of a child, no matter how reliable it might be, in the absence of corroboration. The changes came about after three committees made recommendations. Several new procedures were introduced in ss 79A-79G. With the leave of the court, vulnerable witnesses can now give evidence at trial in a room separate from the court by live television link. Interviews with children and mentally handicapped witnesses can be conducted and video recorded in informal surroundings and the recording can be accepted as evidence in court. Committal proceedings in respect of cases involving children or mentally handicapped witnesses can be replaced by a notice of transfer issued by the prosecution certifying that the evidence is sufficient for the accused to be committed to trial, to avoid the witnesses having to testify both at committal and at trial.

Measures were also introduced to protect child witnesses from the trauma of testifying in court in incest cases, so that for instance a child's video-taped evidence could be produced as evidence in court. This was achieved by extending the definition of 'sexual abuse' to include incest.

Further improvements to the system were made in 1996 when amendments were passed empowering the jury, in cases where defendants are unfit to plead in court to determine whether the accused person did the act or made the omission charged. The court was also given a wider range of options for dealing with a defendant who is found to be not guilty by reason of insanity including guardianship orders, supervision and treatment orders and absolute discharge. Previously the only option was to send the accused to the Siu Lam Psychiatric Centre or a mental hospital for indefinite detention which could result in an innocent person being detained indefinitely because he suffered from a mental disability and was unfit to plead. (Thus there was no requirement for the court to determine whether such a person did the act or made the omission charged.) Again these changes followed amendments to similar legislation in the UK in 1992 which had been criticised for the same problems.

In 1997, a statutory board was established to review long term prison sentences, including detention at Her Majesty's pleasure (now Executive discretion). Improvements were needed to enhance the fairness and effectiveness of the prison sentence review system and to bring it into line with the European Convention on Human Rights. The European Court of Human Rights (ECHR) had held that discretionary life sentences comprised two parts, namely a punitive tariff period for the offence itself and a subsequent discretionary period the purpose of which is to protect the public from the danger of that prisoner reoffending if released. The ECHR held that discretionary life prisoners were entitled to have the lawfulness of their continued detention tested before a court after expiry of the punitive tariff.

Following the establishment of the Long-term Prison Sentences Review Board, ss 67B-67E were added to Cap 221 providing that minimum terms be determined by the Chief Executive in respect of prisoners serving mandatory life sentences and those serving discretionary life sentences or being detained at Executive discretion. Provisions are included so that prisoners have the chance to make written representations both before the Chief Justice makes the recommendations on the minimum terms of their sentences and before the Chief Executive took a final view. In 2004 further amendments were made to these provisions in the Criminal Procedure (Amendment) Ordinance (22 of 2004). The Court of First Instance held in *Yau Kwong Man & Anor v Secretary For Security* [2002] 3 HKC 457 that s 67C was inconsistent with Art 80 of the Basic Law as by giving the Chief Executive the power to fix the period of time that an offender must serve to extinguish the retributive and deterrent elements of his sentence, the section gave the Chief Executive the power to exercise what was an inherently judicial power. Sections 67C, 67D and 67E were replaced and ss 67F and 67G were added.

In 2003 changes were made to the law regarding the competence and compellability of spouses following the recommendations and report of the Law Reform Commission. At common law, a person is not competent to give evidence for or against their spouse, except in very limited circumstances. Over the years, various statutory provisions extended the exceptions, for example where a spouse was charged with certain sexual offences. Prior to the amendments contained in the Evidence (Miscellaneous Amendments) Ordinance (23 of 2003) a person could not be compelled to give evidence against his or her spouse under any circumstances. The amendments to the Evidence Ordinance and Criminal Procedure Ordinance mean that the spouse of a defendant is now compellable to give evidence for the prosecution and for a co-accused if (a) the offence involves an assault on, or injury or threat of injury to the husband or wife of the defendant; (b) where the offence involves causing the death of, an assault on, or injury or threat of injury to a child of the family who was under 16 years old at the material time or was a mentally incapacitated person; or at the time when the evidence is given is a mentally incapacitated person; (c) where the offence charged is a sexual offence alleged to have been committed on a child of the family under 16 years old or was a mentally incapacitated person; or at the time when the evidence is given is a mentally incapacitated person; or (d) where the offence consists of attempting or conspiring to commit, or aiding and abetting, counseling or procuring or inciting the commission of any of the above offences. The court has been given a discretion to exempt a spouse from testifying against a defendant if it considers there is a substantial risk of serious harm to the relationship between the defendant and the spouse, serious emotional, psychological or economic consequences for the spouse.

Under Part II of the Evidence (Miscellaneous Amendments) Ordinance (23 of 2003), a new Part III B is to be added to Criminal Procedure Ordinance to provide for the giving of evidence by way of a live television link to the proceedings. This will allow a witness who is abroad to give evidence by the link, thus reducing inconvenience to the witness in having to travel to Hong

Kong to testify. The place from where the witness is giving evidence will be deemed to be part of the Hong Kong courtroom and the witness giving evidence overseas will enjoy and be subject to the same rules of procedure as a witness giving evidence in Hong Kong. Amendments were made during the legislative process after concern was expressed about the court's discretion to permit a witness to give evidence overseas. Under subsection (2) of s 79I, the court shall not give permission if the person concerned is in Hong Kong, if evidence can more conveniently be given in Hong Kong, if a television link is not available and cannot reasonably be made available, if measures to ensure that the witness will not be giving evidence without coercion cannot reasonably be taken, or if it is not in the interests of justice to do so. However, this Part II has not come into operation at time of publication.

The Ordinance is divided in the following parts:

- Part I - Business of the court
- Part IA - Bail
- Part II - Proceedings preliminary to trial
- Part III - Proceedings at trial
- Part IIIA - Special procedures for vulnerable witnesses
- Part IV - Appeals, Questions of law reserved and referred and review
- Part IVA - Other proceedings subsequent to trial
- Part V - Parties
- Part VI - Miscellaneous

The essential provisions of the Ordinance are as follows:-

Part I

- Rules of practice and procedure (s 9)
- Legal aid in criminal cases (s 9A)

Part IA

- Right of accused person to bail (s 9D)
- Circumstances in which bail may be refused (s 9G)
- Procedure in bail proceedings (s 9N)

Part II

- Institution of proceedings (s 14)
- Right of Secretary for Justice not to prosecute (s 15)
- Discharge of accused after committal without a hearing (s 16)

Part III

- Arraignment of accused person (s 49)
- Competency of witnesses in criminal cases (s 54)
- Abolition of corroboration rule in respect of alleged accomplices (s 60)
- Proof by written statement (s 65B)
- Proof by formal admission (s 65C)
- Notice of alibi required (s 65D)
- Notice of expert evidence (s 65DA)

- Computation of sentences of imprisonment (s 65A)
- Arraignment and trial of insane person (ss 74-76A)
- Part IIIA**
 - Vulnerable witnesses may give evidence by live television link (s 79B)
 - A child may give evidence-in-chief in certain offences by way of video recorded evidence (s 79C)
- Part IV**
 - Power to reserve questions of law for consideration of the Court of Appeal (s 81)
 - Application for review of sentence by Secretary for Justice (s 81A)
 - Right of appeal (s 82)
 - Power to order retrial (s 83E)
 - Appeal against sentence (ss 83G-83H)
 - Reference to Court of Appeal by Chief Executive (s 83P)
- Part IVA**
 - Criminal bankruptcy order (s 84A)
- Part V**
 - Aiders, abettors and accessories (s 89)
- Part VI**
 - Prosecution does not have to prove negative averments (s 94A)
 - Disposal of property connected with offences (s 102)
 - Restriction on imprisonment of people aged between 16 and 21 (s 109A)
 - Supervision orders (s 109AA)
 - Recall orders (s 109AB)
 - Suspended sentences (s 109B)
 - Criminal proceedings may be held in camera and non-disclosure of identity of witnesses in certain cases (s 123)

76A. Evidence by prosecution of insanity or diminished responsibility

Where on a trial for murder the accused person contends-

- (a) that at the time of the alleged offence he was insane so as not to be responsible according to law for his actions; or
 - (b) that at that time he was suffering from such abnormality of mind as is specified in section 3(1) of the Homicide Ordinance (Cap 339) (diminished responsibility),
- the court shall allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence.

(Added 34 of 1972 s 13)
[cf 1964 c 84 s 6 U.K.]

[76A.01] Enactment history

This section was added by s 13 of the Criminal Procedure (Amendment) (No. 2) Ordinance 1972 (34 of 1972), commencing 1 September 1972.

[76A.02] England

Subsection (1) is to the same effect as s 6 of the Criminal Procedure (Insanity) Act 1964 c 84 [Eng].

[76A.03] General note

This section, by providing that where the defence to a charge of murder is insanity, the prosecution may adduce evidence that the accused was suffering from diminished responsibility, and vice versa, resolves a conflict of practice referred to in *R v Duke* [1963] 1 QB 120, [1961] 3 All ER 737.

[76A.04] Insane

Where it appears that at the time of the conduct which constitutes the crime that the accused was labouring under a defect of reason owing to a disease of the mind so as not to know the nature and quality of his act, or if he knew this, so as not to know that what he was doing was wrong, he is not regarded in law as responsible for his act: see *R v M'Naghten* (1843) 10 Cl & Fin 200 (HL).

[76A.05] Diminished responsibility

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing: see s 3 of the Homicide Ordinance (Cap 339).

[76A.06] Definition

For 'court' see s 2 above.

Pregnancy (Amended 13 of 1981 s 7)

77. (Repealed 24 of 1993 s 10)**[77.01] Enactment history**

This section was repealed pursuant to s 10 of the Crimes (Amendment) Ordinance 1993 (24 of 1993), commencing 23 April 1993.

78. (Repealed 13 of 1981 s 7)**[78.01] Enactment history**

This section was repealed pursuant to s 7 of the Offences against the Person Ordinance 1981 (13 of 1981), commencing 13 February 1981.

Record of proceedings**79. Record of proceedings and inspection thereof**

- (1) A record (whether made by means of shorthand notes, by mechanical means or otherwise) kept in accordance with rules made under section 9, or such other record as the trial judge may direct, shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorized to appeal to the Court of Appeal.
- (2) A record taken under subsection (1) shall be open for inspection without fee or reward by-
 - (a) a judge;
 - (b) the Registrar;
 - (c) the Secretary for Justice; (Amended L.N. 362 of 1997)
 - (d) a judge or deputy judge of the District Court;
 - (e) the registrar of the District Court;
 - (f) a party interested or his legal representative;
 - (g) any person, or his legal representative, who satisfies the Registrar that such inspection is reasonably required in

- connection with actual or potential civil or criminal proceedings by or against that person;
- (h) any person who satisfies the Registrar that there is good and sufficient reason for that inspection.
- (3) A decision by the Registrar to refuse permission to inspect shall be final.
- (4) The right to inspect under subsection (2) shall include the right to a copy of the record subject, in the case of applicants under subsection (2)(g) and (h), to payment of the prescribed fee.
- (5) Disclosure of the contents of a record under subsection (2) shall not amount to a breach of the Rehabilitation of Offenders Ordinance (Cap 297).
- (6) For the purposes of subsection (2) 'a party interested' (有利害關係的一方) means the prosecutor or the person convicted or any person named in, or immediately affected by, any order made by the trial judge or any other person authorized to act on behalf of any such person.
- (Replaced 13 of 1995 s 43)

[79.01] Enactment history

This section was replaced pursuant to s 43 of the Administration of Justice (Miscellaneous Provisions) Ordinance 1995 (13 of 1995), commencing 16 February 1995 and amended by L.N. 362 of 1997. Subsection (2)(e) was amended pursuant to s 45 of the District Court (Amendment) Ordinance 2000 (28 of 2000), commencing 1 September 2000.

[79.02] Judge

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Chief Justice, a judge of the Court of Final Appeal, the Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance and a deputy judge of the Court of First Instance.

[79.03] Court of Appeal

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning the Court of Appeal of the High Court.

[79.04] Secretary for Justice

This is defined as meaning the Secretary for Justice of the Hong Kong Special Administrative Region, in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

[79.05] District Court

This is defined as meaning the District Court of the Hong Kong Special

Administrative Region in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

[79.06] Definition

For 'Registrar', see s 2 above.

PART IIIA

SPECIAL PROCEDURES FOR VULNERABLE WITNESSES
(Part IIIA added 69 of 1995 s 3)

79A. Interpretation

In this Part, unless the context otherwise requires-

'child' (兒童) means a person who-

- (a) in the case of an offence of sexual abuse-
 - (i) is under 17 years of age; or
 - (ii) for the purposes of section 79C, if the person was under that age when a video recording to which section 79C applies was made in respect of him, is under 18 years of age; or
- (b) in the case of an offence to which this Part applies, other than an offence of sexual abuse-
 - (i) is under 14 years of age; or
 - (ii) for the purposes of section 79C, if the person was under that age when a video recording to which section 79C applies was made in respect of him, is under 15 years of age;

'court' (法院、法庭) includes the District Court and a magistrate;

'live television link' (電視直播聯繫) means a system in which a courtroom and another room located in the same premises as the courtroom are equipped with, and linked by, a closed circuit television system-

- (a) that is capable of allowing-
 - (i) persons in the courtroom to see and hear persons in the other room; and
 - (ii) persons in the other room to hear, or see and hear, persons in the courtroom;
- (b) for the purpose of persons in the other room giving evidence in the proceedings taking place in the courtroom,

and includes a similar system linking a room in which a magistrate is taking a deposition in writing under section 79E with another room from which the person gives evidence for the purpose of the deposition;

'mentally incapacitated person' (精神上無行為能力的人) means a person who is mentally disordered or mentally

handicapped, as the case may be, within the meaning of the Mental Health Ordinance (Cap 136); (Replaced 81 of 1997 s 59)

'notice of transfer' (移交通知) means a notice served under section 79F;

'offence of cruelty' (殘暴罪行) means an offence against section 26 or 27 of the Offences against the Person Ordinance (Cap 212);

'offence of sexual abuse' (性虐待罪行) means

- (a) an offence against Part VI or Part XII, other than sections 126, 147A and 147F, of the Crimes Ordinance (Cap 200); or
- (b) an offence against section 3 of the Prevention of Child Pornography Ordinance (Cap 579); (Replaced 31 of 2003 s 19)

'statement' (陳述) includes any representation of fact, whether made in words or otherwise;

'video recording' (錄影紀錄) means a recording, on any medium, from which a moving image may by any means be produced and includes the accompanying sound-track.

(Added 69 of 1995 s 3)

[79A.01] Enactment history

This section was added pursuant to s 3 of the Criminal Procedure (Amendment) Ordinance 1995 (69 of 1995) and was subsequently amended pursuant to s 5 of the Criminal Procedure (Amendment) Ordinance 1996 (37 of 1996), commencing 1 November 1996. The definition of 'mentally incapacitated person' was replaced pursuant to s 59 of the Mental Health (Amendment) Ordinance 1997 (81 of 1997), commencing 1 February 1999. The definition of 'offence of sexual abuse' was replaced by s 19 of the Prevention of Child Pornography Ordinance (31 of 2003), commencing 19 December 2003.

[79A.02] General note

This section does not apply to any trial or committal proceedings within the meaning of s 71A of the Magistrates Ordinance (Cap 227) that commenced before the 16 February 1996: s 1(2) of the Criminal Procedure (Amendment) Ordinance 1995 (69 of 1995).

[79A.03] This Part

ie Part IIIA ss 79A-79G.

[79A.04] Mentally incapacitated person

This is defined in s 2 of the Mental Health Ordinance (Cap 136) as meaning a patient or a mentally handicapped person.

[79A.05] Offence of sexual abuse against Part VI or Part XII of the Crimes Ordinance (Cap 200) with exceptions

See ss 47-48 and ss 118-118L, 119-125, ss 127-147, and s 148 of the Crimes Ordinance (Cap 200).

[79A.06] Section 3 of the Prevention of Child Pornography Ordinance

See (1) Any person who prints, makes, produces, reproduces, copies, imports or exports any child pornography commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
- (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.

(2) Any person who publishes any child pornography commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
- (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.

(3) Any person who has in his possession any child pornography (unless he is the only person pornographically depicted in the child pornography) commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$500,000 and to imprisonment for 2 years.

(4) Any person who publishes or causes to be published any advertisement that conveys or is likely to be understood as conveying the message that any person has published, publishes or intends to publish any child pornography commits an offence and is liable-

- (a) on conviction on indictment to a fine of \$2,000,000 and to imprisonment for 8 years; or
- (b) on summary conviction to a fine of \$1,000,000 and to imprisonment for 3 years.

79B. Evidence by live television link

(1) In this section-

'witness in fear' (在恐懼中的證人) means a witness whom the court hearing the evidence is satisfied, on reasonable grounds, is apprehensive as to the safety of himself or any member of his family if he gives evidence.

(2) Where a child, other than the defendant, is to give evidence,

or be examined on video recorded evidence given under section 79C, in proceedings in respect of-

- (a) an offence of sexual abuse;
- (b) an offence of cruelty; or
- (c) an offence which involves an assault on, or injury or a threat of injury to, a person and the offence is triable-
 - (i) on indictment; or
 - (ii) either summarily or on indictment,

the court may, on application or on its own motion, permit the child to give evidence or be examined by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.

(3) Where a mentally incapacitated person, including one who is a defendant, is to give evidence, or be examined on video recorded evidence given under section 79C, in proceedings in respect of an offence that is triable- (Amended 81 of 1997)

- (a) on indictment; or
 - (b) either summarily or on indictment,
- the court may, on application or on its own motion, permit the person to give evidence or be examined by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.

(4) Where a witness in fear is to give evidence in proceedings in respect of any offence, the court may, on application or on its own motion, permit the person to give evidence by way of a live television link, subject to such conditions as the court considers appropriate in the circumstances.

(5) Where a person is giving evidence in proceedings or being examined by way of a live television link, the place from which he is giving the evidence shall, for all purposes in connection with such proceedings, be deemed to be part of the courtroom in which such proceedings are taking place.

(Added 69 of 1995 s 3)

[79B.01] Enactment history

This section was added pursuant to s 3 of the Criminal Procedure (Amendment) Ordinance 1995 (69 of 1995) and was subsequently amended pursuant to s 59 of the Mental Health (Amendment) Ordinance 1997 (81 of 1997), commencing 1 February 1999.

[79B.02] General note

This section does not apply to any trial or committal proceedings within the

- (c) specifying the country from which the drug was originally exported;
- 'ecgonine' (芽子鹼) means laevo-ecgonine and any derivatives of ecgonine from which it may be recovered industrially;
- 'export' (出口) means to take or cause to be taken out of Hong Kong or any other country, as the case may be, by land, air or water;
- 'export authorization' (出口授權書) means an authorization issued by a competent authority in the country outside Hong Kong from which a dangerous drug is to be exported-
- (a) containing full particulars of such drug and the quantity authorized to be exported and of the names and addresses of the person by whom the drug is to be exported and the person to whom it is to be sent; and
- (b) specifying the country to which, and the period within which, it is to be exported;
- 'import' (進口) means to bring or cause to be brought into Hong Kong or any other country, as the case may be, by land, air or water;
- 'in transit' (過境途中) means imported into Hong Kong for the sole purpose of being exported from Hong Kong to another country;
- 'inject' or 'injection' (注射) means injection into any person by a hypodermic syringe or any other method;
- 'manufacture' (製造) means any act connected with making, adulterating, purifying, mixing, separating or otherwise treating a dangerous drug; (Replaced 40 of 1982 s 2)
- 'matron' (總護士長) includes any person performing the duties of a matron and any person, whatever the title of the office which he holds, performing duties of the kind performed by a matron;
- 'medicinal opium' (藥用鴉片) means raw opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the European Pharmacopoeia or the United States Pharmacopoeia, whether it is in the form of powder or is granulated or is in any other form, and whether or not it is mixed with neutral substances; (Amended 13 of 1999 s 3)

- 'opium' (鴉片) includes raw opium, prepared opium, opium dross and every substance (other than medicinal opium) containing any proportion of raw opium, prepared opium or opium dross;
- 'opium dross' (鴉片煙渣) means any residue remaining after opium has been smoked;
- 'opium poppy' (鴉片罌粟) means a plant of the species *Papaver somniferum* L or the species *Papaver setigerum* D.C. and any plant from which morphine may be produced;
- 'opium water' (鴉片水) means an aqueous extract of opium; (Added 46 of 1971 s 2)
- 'owner' (擁有人), in relation to any premises, includes any person holding premises direct from the Government, whether under lease, licence or otherwise, any mortgagee in possession and any person receiving the rent of any premises, solely or with another and on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant, and, where such owner as above defined cannot be found or ascertained or is absent from Hong Kong or is under disability, also includes the agent of such owner; (Amended 46 of 1971 s 2; 29 of 1998 s 105)
- 'place' (場所) means any ship, aircraft, vehicle, building, structure or enclosure, whether movable or not, and any spot on land or water;
- 'poppy straw' (罌粟稈) means all parts, except the seeds, of the opium poppy after mowing; [cf 1965 c 15 s 24(1) U.K.]
- 'preparation' (製劑) means a preparation, mixture, extract or other substance containing any proportion of a dangerous drug specified in any of paragraphs 1 to 7 of Part I of the First Schedule; (Amended 46 of 1971 s 2)
- 'prepared opium' (熟鴉片) includes any preparation of opium, and any substance of which opium forms an ingredient, which is used or intended to be used, or is capable of being used, for smoking, inhaling, ingestion or injection;
- 'prescribed hospital' (訂明醫院) means a hospital maintained by the Government, a military hospital and a hospital or institution specified in the Second Schedule; (Amended 2 of 2012 s 3)

'prescription' (處方) means a prescription for a single individual given by a registered medical practitioner for the purposes of medical treatment, by a registered dentist for the purposes of dental treatment or by a registered veterinary surgeon for the purposes of animal treatment; (Amended 96 of 1997 s 32) [cf SI 1964/1811 reg 32(1) U.K.]

'raw opium' (生鴉片) means any kind of opium not prepared for smoking, inhaling, ingestion or injection and also means the leaves or wrappings in which raw opium has been wrapped, but does not include opium dross;

'registered dentist' (註冊牙醫) means-

- (a) a dentist registered under the Dentists Registration Ordinance (Cap 156) but who is not qualified to be so registered by virtue of having been registered under the repealed Dentists Registration Ordinance 1940 (1 of 1940, see Cap 156, 1950 Ed.); or (Amended 34 of 1995 s 44)
- (b) a person deemed to be a registered dentist under the Dentists Registration Ordinance (Cap 156); (Replaced 62 of 1987 s 10)

'registered veterinary surgeon' (註冊獸醫) means a veterinary surgeon registered under the Veterinary Surgeons Registration Ordinance (Cap 529); (Added 96 of 1997 s 32)

'ship' (船舶) includes every description of vessel used in navigation or for the carriage or storage of goods on water;

'sister' (護士長) includes any person performing the duties of a nursing sister and any person, whatever the title of the office which he holds, performing duties of the kind performed by a nursing sister;

'specified clinic' (指明診療所), in relation to a specified person, means the clinic specified in the authorization under section 22(5A) by virtue of which such person is a specified person; (Added 2 of 1992 s 2)

'specified dangerous drug' (指明危險藥物), in relation to a specified person, means any dangerous drug specified in the authorization under section 22(5A) by virtue of which such person is a specified person; (Added 2 of 1992 s 2)

'specified person' (指明的人) means a person authorized under section 22(5A); (Added 2 of 1992 s 2)

'trafficking' (販運), in relation to a dangerous drug, includes importing into Hong Kong, exporting from Hong Kong, procuring, supplying or otherwise dealing in or with the dangerous drug, or possessing the dangerous drug for the purpose of trafficking, and 'traffic in a dangerous drug' (販運危險藥物) shall be construed accordingly; (Amended 52 of 1992 s 2)

'unlawful' or 'unlawfully' (非法), in relation to trafficking in or manufacturing or storage of a dangerous drug, means otherwise than under and in accordance with this Ordinance or a licence issued thereunder; (Amended 46 of 1971 s 2)

'wholesale dealer' (批發商) means a person who carries on the business of selling dangerous drugs to persons who buy to sell again, and 'wholesale dealing' (批發經營) shall be construed accordingly. [cf SI 1964/1811 reg 32(1) U.K.]

- (2) For the purposes of this Ordinance, a person shall be deemed to be in possession of a dangerous drug or a pipe, equipment or apparatus, as the case may be, if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf. [cf SI 1964/1811 reg 20 U.K.]
- (3) Any quantity of a dangerous drug shall be a dangerous drug for the purposes of this Ordinance notwithstanding that the quantity is insufficient to be measured or used. (Added 40 of 1982 s 2)
- (4) The Secretary for Security may, by notice in the Gazette, specify a Convention or Protocol for the purposes of this Ordinance. (Added 89 of 1995 s 34)

[2.01] Enactment history

The definition of 'cannabis' was replaced by s 2 of the Dangerous Drugs (Amendment) Ordinance 1978 (46 of 1978), commencing on 23 June 1978.

The definition of 'cannabis resin' was added by s 2 of the Dangerous Drugs (Amendment) Ordinance 1994 (62 of 1994), commencing on 1 October 1994.

The definitions of 'Conventions' and 'corresponding law' were substituted pursuant to s 34 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing on 1 September 1995.

Pursuant to s 3 of Adaptation of Laws (No 3) Ordinance 1999 (13 of 1999), commencing on 1 July 1997, s 2 was amended—

- (a) in the definition of 'Chief Pharmacist', by repealing 'Governor' and substituting 'Chief Executive';
- (b) in the definition of 'Conventions'—
 - (i) by repealing paras (a) to (d);
 - (ii) in para (i), by repealing '(a), (b), (c), (d)'.

Pursuant to a Resolution made and passed by the Legislative Council under s 54A of the Interpretation and General Clauses Ordinance (Cap 1) on 15 March 1989 (L.N. 76 of 1989), with effect from 1 April 1989, s 2 was amended in the definition of 'Director' by repealing 'Director of Medical and Health Services a deputy director of medical and health services or an assistant director of medical and health services' and substituting 'Director of Health, Deputy Director of Health or an assistant director of health'.

The definition of 'manufacture' was replaced by s 2 of the Dangerous Drugs (Amendment) Ordinance 1982 (40 of 1982), commencing on 18 June 1982.

Pursuant to s 3 of Adaptation of Laws (No 3) Ordinance 1999 (13 of 1999), commencing on 1 July 1997, s 2 was amended in the definition of 'medicinal opium' by repealing 'British Pharmacopoeia' and substituting 'European Pharmacopoeia or the United States Pharmacopoeia'.

The definition of 'opium water' was added pursuant to s 2 of the Dangerous Drugs (Amendment) Ordinance 1971 (46 of 1971), commencing on 20 August 1971.

The definition of 'owner' was amended under s 2 of the Dangerous Drugs (Amendment) Ordinance 1971 (46 of 1971), commencing on 20 August 1971, by inserting before the word 'includes' in the first place where it occurs the phrase 'in relation to any premises'.

Pursuant to s 105 of the Adaptation of Laws (Crown Land) Ordinance (29 of 1998), commencing on 1 July 1997, s 2 was amended in the definition of 'owner' by repealing 'Crown' wherever such term appears and substituting 'Government'.

The definition of 'preparation' was amended under s 2 of the Dangerous Drugs (Amendment) Ordinance 1971 (46 of 1971), commencing on 20 August 1971, by deleting 'admixture' and substituting the term 'mixture'.

The definition of 'prescribed hospital' was amended by repealing 'Crow' and substituting 'Government, a military hospital', pursuant to s 28 of Schedule 1 to the Adaptation of Laws (Military References) Ordinance 2012 (2 of 2012), commencing on 17 February 2012.

Pursuant to s 32 of the Veterinary Surgeons Registration Ordinance 1997 (96 of 1997), commencing on 14 July 1997, s 2 was amended—

- (a) in the definition of 'prescription' by repealing 'an approved' and substituting 'a registered';
- (b) by adding—

'registered veterinary surgeon' means a veterinary surgeon registered under the Veterinary Surgeons Registration Ordinance (Cap 529).

Due to s 44 Medical & Related Professionals (Registration) (Miscellaneous Amendments) Ordinance 1995 (34 of 1995), commencing on 1 July 1995, s 2 was amended in the definition of 'registered dentist' by repealing everything after '(Cap 156)' and substituting 'but who is not qualified to be so registered by virtue of having been registered under the repealed Dentists Registration Ordinance 1940 (1 of 1940, see Cap 156, 1950 Ed)'.

The definitions of 'specified clinic', 'specified dangerous drug' and 'specified person' were added pursuant to s 2 of the Dangerous Drugs (Amendment) Ordinance 1992 (2 of 1992), commencing on 18 January 1992.

By virtue of s 2 Dangerous Drugs (Amendment) (No 2) Ordinance 1992 (52 of 1992), commencing on 26 June 1992, s 2 was amended in the definition of 'trafficking' by adding 'or possessing the dangerous drug for the purpose of trafficking,' after 'the dangerous drug'.

The definition of 'unlawful' or 'unlawfully' was amended under s 2 of the Dangerous Drugs (Amendment) Ordinance 1971 (46 of 1971), commencing on 20 August 1971, by inserting after 'manufacturing' the phrase 'or storage'.

Subsection (3) was added pursuant to s 2 of the Dangerous Drugs (Amendment) Ordinance 1982 (40 of 1982), commencing on 18 June 1982.

Subsection (4) was added pursuant to s 34 of the Drug Trafficking (Recovery of Proceeds) (Amendment) Ordinance 1995 (89 of 1995), commencing on 1 September 1995.

[2.02] Authorized seller of poisons

Under s 11(1) of Pharmacy and Poisons Ordinance (Cap 138), a business comprising the retail sale of poisons carried on by a registered pharmacist or by a body corporate or an unincorporated body of persons shall be authorized seller of poisons if the actual sale of poisons is conducted on premises duly registered under that Ordinance by a registered pharmacist or in his presence and under his supervision.

[2.03] Cannabis

Cannabis (as separated from cannabis resin), like opium poppy, is one of the plants controlled under this Ordinance.

[2.04] Chief Pharmacist

Under s 22(1) below, the Chief Pharmacist is authorized, so far as may be necessary for the practice or exercise of his profession, function or employment, and in his capacity as such, to be in possession of and to supply a dangerous drug.

[2.05] The Single Convention on Narcotic Drugs signed at New York on 30 March 1961

Sections 4(4)(b)(ii), 11(2), 12(2), 14(1)(b), 15(2) and 16(2)(b) of this Ordinance make reference to this Convention.

[2.06] The Convention on Psychotropic Substances signed at Vienna on

21 February 1971

Sections 4(4)(b)(ii), 11(2), 12(2), 14(1)(b), 15(2) and 16(2)(b) of this Ordinance make reference to this Convention.

[2.07] The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed at Vienna on 20 December 1988

Sections 4(4)(b)(ii), 11(2), 12(2), 14(1)(b), 15(2) and 16(2)(b) of this Ordinance make reference to this Convention. The full text of this Convention can be found in the schedule of the Fugitive Offenders (Drugs) Order (Cap 503J).

[2.08] Any Convention or Protocol specified in a notice under subsection (4) to be a Convention or Protocol for the purposes of this Ordinance

Sections 4(4)(b)(ii), 11(2), 12(2), 14(1)(b), 15(2) and 16(2)(b) of this Ordinance make reference to the convention or protocol specified here.

[2.09] Any convention or final protocol amending, supplementing or in substitution for an of the Conventions or Protocols referred to in paragraphs (e), (f), (g) and (h)

Sections 4(4)(b)(ii), 11(2), 12(2), 14(1)(b), 15(2) and 16(2)(b) of this Ordinance make reference to the convention or protocol specified here.

[2.10] A law stated in a certificate

See s 43 below.

[2.11] Dangerous drugs

The trial judge is entitled to take judicial notice that 'pak fan' (white powder) is a term reserved for heroin in the form which is commonly used in Hong Kong: *Chan Man Ching v R* [1978] HKLR 97, [1978] HKCU 22. The judge can also take judicial notice of the fact that the average consumption of a heroin addict is between 0.25 and 0.7 gram of pure heroin a day; *R v Chan Kwok Kei* Unreported, Crim App 324/1995, [1995] HKCU 253; *R v Cheung Ping Chiu* Unreported, Crim App 162/93, [1994] HKCU 17; *HKSAR v Lee Chun Tat* [2006] HKCU 1490, [2006] HKCU 2077.

The court can rely on expert's evidence on the street value of the dangerous drugs: *R v Lo Yan Kan* [1997] 3 HKC 430.

[2.12] To take or cause to be taken out

There is no statutory definition of this phrase. According to the *New Shorter Oxford English Dictionary*, Thumb Index Edition, the meaning of 'take out' includes 'remove a person or thing from within a room, receptacle, enclosure, etc'. In interpreting the phrase 'to take or cause to be taken out', reference can be made to the decision in *AG v Tse Hung Lit* [1986] HKC 294, which concerns the interpretation of the similar phrase in the Import and Export Ordinance (Cap 60). It was held that when it is made an offence for a person to 'cause' the doing of a prohibited act by another, the provision of the statute should be interpreted as confined to cases where the prohibited act is done on

the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. In determining whether a person 'causes' the doing of a prohibited act by another, the court will take into account the role played by that person in the transaction concerned: 香港特別行政區 訴 曾輝嵐 Unreported, HCMA 461/2006 (Chinese judgment)

[2.13] Hong Kong

Under s 3 of the Interpretation and General Clauses Ordinance (Cap 1), 'Hong Kong' means the Hong Kong Special Administrative Region, which means the Hong Kong Special Administrative Region of the People's Republic of China, the geographical extent of which is the land and sea specified or referred to in Sch 2 of that Ordinance.

[2.14] Making, adulterating, purifying, mixing, separating or otherwise treating a dangerous drug

There is no statutory definition of the above terms. According to the *New Shorter Oxford English Dictionary*, Thumb Index Edition:

- the meaning of 'make' includes 'produce by combination of parts or ingredients, by giving a certain form to matter, by extraction, or by modification of some other substance; construct, frame fashion';
- the meaning of 'adulterate' includes 'render spurious; debase especially by admixture of other substances';
- the meaning of 'mix' includes 'put together or combine two or more substances or things so that the constituents of each are diffused among those of the other or others; mingle, blend; prepare a compound by combining various ingredients';
- the meaning of 'separate' includes 'put apart, disunite, part, detach, disconnect, treat as distinct; remove or extract a substance from another with which it is combined or mixed especially by a technical process'; and
- the meaning of 'treat' includes 'deal with or behave or act towards in a specified way; regard in a particular way and deal with accordingly; subject to chemical etc, action; act upon to obtain a particular result'.

[2.15] The European Pharmacopoeia

It is published under the direction of the Council of Europe according to the Convention on the Elaboration of a European Pharmacopoeia. It sets out standards for the composition and preparation of substances used in the manufacture of medicines.

[2.16] The United States Pharmacopoeia

It is an official publication of the United States Pharmacopoeial Convention containing standards and methods of analysis for articles used as drugs, medical devices and nutritional supplements.

[2.17] Owner

The definition is so wide that it covers, *inter alia*, any persons living in public